NOT DESIGNATED FOR PUBLICATION

No. 125,630

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOHN D. HOUZE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Submitted without oral argument. Opinion filed December 29, 2023. Appeal dismissed.

James M. Latta, 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 BRUNS, P.J., COBLE and PICKERING, JJ.

PER CURIAM: John D. Houze appeals after a jury convicted him of felony criminal possession of a weapon in violation of K.S.A. 2020 Supp. 21-6304(a)(1). Although the jury also convicted him of three misdemeanor charges, he does not appeal from these convictions. On appeal, Houze contends that the version of the criminal possession of a weapon statute in effect at the time of his crime is unconstitutionally vague. In addition, he contends the district court erred in allowing the State to amend the charge of criminal possession of a weapon at trial. As to his first contention, we find that Houze lacks standing to challenge the constitutionality of K.S.A. 2020 Supp. 21-6304(a)(1) for the

first time on appeal. As to his second contention, we find that Houze failed to preserve this issue for appeal. Accordingly, we dismiss.

FACTS

On May 7, 2021, the State charged Houze with criminal possession of a weapon by a convicted felon under K.S.A. 2020 Supp. 21-6304(a)(3)(A). At the same time, the State also charged Houze with three misdemeanors including possession of marijuana, possession of drug paraphernalia, and fleeing or attempting to elude a police officer. On the day of trial—but before the jury was sworn in—the parties stipulated in writing: "1. That on May 4, 2021, the Defendant had been previously convicted of a person felony." and "2. The Defendant was found to be in possession of a firearm at the time of the prior felony."

Immediately after the parties entered into the written stipulation, the State moved to amend the original charging document to change the subsection of the criminal possession of a firearm charge from K.S.A. 2020 Supp. 21-6304(a)(3)(A) to K.S.A. 2020 Supp. 21-6304(a)(1). Houze did not object to the requested amendment or to the State's proposed jury instruction consistent with the language of K.S.A. 2020 Supp. 21-6304(a)(1). Consequently, the district court allowed the amendment.

In addition to the responding officers who had arrested Houze, the State called two expert witnesses at trial. A weapons expert with the Wichita Police Department testified that he fired the gun confiscated from the vehicle that Houze was driving on the night of his arrest and it worked as designed. Likewise, a criminalistics manager in the Drug Identification Center at the Forensic Science Center testified that the plant material confiscated near Houze's car was tested and found to be marijuana containing tetrahydrocannabinol.

In his defense, Houze called Lashante Johnson as a witness. Johnson testified that she was Houze's longtime friend and that they "used to mess around." According to Johnson, she borrowed Houze's car to go to the gun range on the day of his arrest. She testified that she was the one that put the gun and bullets in the backpack that the police subsequently found in the car. Further, she claimed that she forgot to remove the backpack, gun, and bullets from the car when she returned it to Houze.

After deliberation, the jury found Houze guilty of all charges. Afterward, Houze filed a motion for new trial or judgment of acquittal that was denied by the district court. Significantly, Houze did not raise either of the issues in the motion that he now attempts to assert for the first time on appeal. Ultimately, the district court sentenced Houze to 17 months' imprisonment.

ANALYSIS

Constitutional Challenge to K.S.A. 2020 Supp. 21-6304(a)(1)

On appeal, Houze contends—for the first time—that K.S.A. 2020 Supp. 21-6304(a)(1) is facially unconstitutional due to vagueness. Because this issue involves a question of law that would be determinative of the criminal possession charge, we may address it on the merits even though it was not raised below. See *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020). Nevertheless, Houze must also show that he has standing to raise the issue.

In its brief, the State contends that Houze lacks standing to challenge the constitutionality of K.S.A. 2020 Supp. 21-6304(a)(1) under the circumstances presented in this case. The question of standing is one of law over which we have unlimited review. *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021). As a general rule, "to invoke

standing, a party must show that he or she suffered a cognizable injury and show a causal connection between the injury and the challenged conduct." *Bodine*, 313 Kan. at 385.

Accordingly, there are two scenarios in which a defendant lacks standing to challenge the constitutionality of a statute on the ground of vagueness: (1) when the defendant's conduct was clearly prohibited by the statute; and (2) when the defendant's vagueness argument rests solely upon how the statute affects the rights of others and not how it was applied to the circumstances in his or her own case. Here, it is important to remember that Houze stipulated to the element of the crime that he now complains is unconstitutionally vague.

The relevant statutory language in K.S.A. 2020 Supp. 21-6304(a)(1) sets forth that criminal possession of a weapon by a convicted felon "is possession of any weapon by a person who: (1) Has been convicted of a person felony . . . and was found to have been in possession of a firearm at the time of the commission of the crime." In other words, in order to prove the violation of K.S.A. 2020 Supp. 21-6304(a)(1), the State was required not only to show that Houze possessed a weapon when he was arrested in this case but also that he had been previously convicted of one or more of a list of enumerated felonies and "was found to have been in possession of a firearm at the time of the commission of the crime."

It is undisputed that Houze stipulated in writing that he had previously been convicted of a person felony—aggravated battery under K.S.A. 2017 Supp. 21-5413(b)(1)—which was one of the felonies set forth in the statute. Additionally, it is undisputed that he stipulated in writing to having been "found to be in possession of a firearm at the time of the prior felony." As a result, the district court properly instructed the jury that "Elements #2 and #3 [were] to be considered by you as proven."

The Kansas Supreme Court has held that a person "to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)." *Hearn v. City of Overland Park*, 244 Kan. 638, 639, 772 P.2d 758, *cert denied* 493 U.S. 976 (1989). Here, because Houze stipulated the provision of the statute which he now seeks to challenge applied to him, he cannot successfully challenge it for vagueness.

We note that when considering standing in cases involving a claim that a statute is unconstitutionality vague, the Kansas Supreme Court and several panels of this court have found that such challenges cannot succeed where defendants concede that their conduct fell under the challenged statute. See *State v. Williams*, 299 Kan. 911, 918, 329 P.3d 400 (2014) (defendant had no standing to allege the statute was unconstitutionally vague when the defendant conceded that his conduct fell within the terms of the statute; see also *State v. Thompson*, 221 Kan. 165, 172, 558 P.2d 1079 (1976); *State v. Stubbs*, No. 125,003, 2023 WL 4284639, at *3 (Kan. App. 2023) (unpublished opinion); *State v. Hansford*, No. 109,105, 2014 WL 1707455, at *3-5 (Kan. App. 2014) (unpublished opinion).

Here, Houze explicitly stipulated that he "was found to be in possession of a firearm at the time of [his] prior felony." At no point did Houze attempt to repudiate his written stipulation, nor did he challenge the existence or nature of his prior felony conviction which resulted in him being prohibited from possessing a firearm. In addition, he did not challenge the fact that he was in possession of the firearm at the time of the prior felony. Moreover, Houze did not allege any confusion as to who needed to find him in possession of the firearm. Rather, his only defense at trial was that the gun recovered in his car was left there by another person without his knowledge.

In summary, we find that Houze stipulated that his conduct fell within the portion of the statute that he now attempts to claim is unconstitutionally vague. As such, he

cannot now claim that the statute is vague. By his stipulation, Houze has conceded that his conduct clearly fell within K.S.A. 2020 Supp. 21-6304(a)(1) because he expressly admitted that he possessed a firearm at the time of the commission of the prior crime. Accordingly, we conclude that Houze does not have standing to challenge the constitutionality of K.S.A. 2020 Supp. 21-6304(a)(1) on vagueness grounds.

Amendment of Charging Document

Next, we address Houze's argument that the district court erred in allowing the State to amend the charge of criminal possession of a weapon just before the start of his trial. Houze suggests that by allowing the amendment, the district court prejudiced his rights under K.S.A. 22-3201(e). However, based on our review of the record, we decline to review this issue for the first time on appeal.

Before the jury was sworn in—and immediately after the parties entered into their written stipulation—the State moved to amend the original charging document to be consistent with the language of K.S.A. 2020 Supp. 21-6304(a)(1). As indicated above, Houze did not object to the State's requested amendment. Likewise, Houze did not object to the State's proposed jury instruction that was consistent with language of the amended complaint.

Houze asserts that he may raise this issue for the first time on appeal because (1) the newly asserted theory involves only a question of law and is finally determinative of the case, and (2) consideration of the theory is necessary to serve the ends of justice or to prevent a denial of fundamental rights. See *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019). But merely "because an exception may permit review of an unpreserved issue . . . does not obligate an appellate court to exercise its discretion and review the issue." *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017); see *State v. Gray*, 311

Kan. 164, Syl. ¶ 1, 459 P.3d 165 (2020) (no obligation to review an issue raised for the first time on appeal even if an exception would apply).

Here, we find that this issue does not involve solely a question of law because the facts surrounding the granting of the request to amend are relevant to determining whether the district court erred. Further, Houze does not show that our consideration of this issue is necessary to serve the ends of justice but merely suggests that he may have "potentially" been deprived a fair trial. Hence, we decline the invitation to consider this issue for the first time on appeal.

We, therefore, conclude that this appeal should be dismissed.

Appeal dismissed.