NOT DESIGNATED FOR PUBLICATION

No. 125,742

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LARRY DEE BEIREIS,
Appellant.

MEMORANDUM OPINION

Appeal from Pratt District Court; FRANCIS E. MEISENHEIMER, judge. Opinion filed December 22, 2023. Affirmed.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Daniel O. Lynch, of Johnston, Eisenhauer, Eisenhauer, & Lynch, LLC, of Pratt, and *Kris W. Kobach*, attorney general, for appellee.

Before HILL, P.J., MALONE and ISHERWOOD, JJ.

PER CURIAM: The way to obtain a departure sentence is to ask for one. If you do not ask—you do not get one. After being convicted of aggravated indecent liberties with a child, Larry D. Beireis appeals the sentencing court's decision not to impose a departure sentence he did not ask for. Finding no abuse of discretion, we affirm.

Beireis pled guilty to aggravated indecent liberties with a child, an off-grid person felony. Beireis had inappropriately touched and had sexual intercourse with his 12-year-

old victim over several years. In the plea agreement, Beireis agreed he would "be sentenced to a mandatory minimum of 25 years to life."

Beireis did not ask for a departure. He asked the district court to impose the mandatory minimum life sentence. The court asked Beireis if he wished to present any mitigation evidence to which Beireis responded, "No, no." The court then stated:

> "Well, I don't know that, that it does anybody any good to make extensive findings here. This is a horrific crime, um, the sentence is set in stone, there is no discretion for the court, um, it's a life sentence which at, with a mandatory service time of twenty-five years which at Mr. Beireis' age, it's not a complete life sentence, it's going to be very close to that."

The court sentenced him to a hard 25 life sentence.

On appeal, Beireis contends the sentencing court made a legal mistake by failing to exercise its discretion to impose a departure sentence. The sentencing court could have on its own motion and relied on multiple substantial and compelling factors to depart including Beireis lack of prior criminal history, his acceptance of responsibility, and his advanced age and poor health. He asks this court to remand for resentencing.

In opposition, the State makes two arguments. The State contends this court lacks jurisdiction to hear Beireis' appeal because the sentencing court imposed an agreed-upon sentence. The State alternatively argues the sentencing court did not abuse its discretion by failing to impose a departure Beireis never requested.

The standard sentence for a first-time conviction of aggravated indecent liberties with a child, when the defendant is 18 years of age or older, is "a mandatory minimum term of imprisonment of not less than 25 years." K.S.A. 2021 Supp. 21-6627(a)(1)(C). The sentencing court "shall impose the mandatory minimum term of imprisonment . . .

unless the judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure." K.S.A. 2021 Supp. 21-6627(d)(1). The court can depart "on its own volition, without a motion from the state or the defendant" if the court first notifies the parties and allows a reasonable time for response. K.S.A. 2021 Supp. 21-6817(a)(3).

We have jurisdiction.

The right to appeal is statutory; the limits of appellate jurisdiction are imposed by the Legislature. *State v. Hooks*, 312 Kan. 604, 606, 478 P.3d 773 (2021). For felony convictions, appellate courts do not have jurisdiction to review "[a]ny sentence that is within the presumptive sentence for the crime" or "any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record." K.S.A. 2022 Supp. 21-6820(c)(1), (2).

In the context of appellate jurisdiction to review presumptive sentences, however, our Supreme Court has held: "[W]hen a district court misinterprets its own statutory authority and explicitly refuses to consider a defendant's request for a discretionary, non-presumptive sentence that the district court has statutory authority to consider, the appellate court may take up the limited question of whether the district court properly interpreted the sentencing statute." *State v. Warren*, 297 Kan. 881, Syl. ¶ 1, 304 P.3d 1288 (2013).

Warren can be distinguished because the potential jurisdictional bar here is not because the sentence was a presumptive sentence under K.S.A. 2022 Supp. 21-6820(c)(1). Rather, the sentence was agreed upon in the plea agreement between the State and Beireis, implicating K.S.A. 2022 Supp. 21-6820(c)(2). Moreover, here, the sentencing court did not explicitly refuse to consider the defendant's request for a discretionary sentence. Beireis never asked for a discretionary sentence.

If Beireis' sentence "result[ed] from an agreement between the state and the defendant which the sentencing court approve[d] on the record," this court would not have jurisdiction over Beireis' appeal. K.S.A. 2022 Supp. 21-6820(c)(2). But the sentencing court did not mention the plea agreement when sentencing Beireis. Rather, the court stated that "the sentence is set in stone, there is no discretion for the court . . . it's a life sentence . . . with a mandatory service time of twenty-five years . . . ."

Thus, we have jurisdiction over the appeal either under the ruling in *Warren* or because the sentencing court did not approve the plea agreement on the record.

Beireis failed to ask for a departure.

Generally, issues not raised before the district court cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). There are several exceptions to the general rule: (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) consideration of the theory is necessary to serve the ends of justice or to prevent a 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). "The decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, we have no obligation to do so. [Citations omitted.]" *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

Beireis did not ask the sentencing court for the departure he now seeks on appeal. He contends the issue was preserved for appeal because it was raised by the sentencing court and, alternatively, that we should reach the issue because it is necessary to serve the ends of justice.

The sentencing court did not raise the issue of a departure sentence; the court merely imposed the sentence Beireis asked for. Beireis now takes a contrary position on appeal. We are not required to reach this issue. Besides, the sentencing court did not abuse its discretion.

There was no abuse of discretion.

Appellate courts review a sentencing court's departure ruling for abuse of discretion. A court abuses its discretion when its decision is (1) based on an error of law; (2) based on an error of fact; or (3) no reasonable person would take the view adopted by the court. *State v. Grable*, 314 Kan. 337, 341, 498 P.3d 737 (2021).

In *Warren*, Warren requested a departure sentence because the amount of marijuana he possessed was very small. The district court ruled it could not grant a departure on that basis. On appeal, the Supreme Court ruled the district court made an error of law and remanded the case for the district court to make the discretionary call whether a departure should be granted. 297 Kan. at 887.

As stated above, *Warren* is distinguishable because Beireis did not request a departure. Moreover, here, the sentencing court did not base its decision on an error of law. Though the sentencing court incorrectly stated it lacked discretion in imposing Beireis' sentence, it only did so after it asked Beireis if he wished to present any evidence in mitigation of his sentence and Beireis responded, "No, no." If the court did not understand its discretion under K.S.A. 2021 Supp. 21-6627(d)(1), it would not have asked Beireis for mitigation evidence. While a sentencing court may raise mitigating

circumstances sua sponte, the statute imposes no affirmative duty for the court do so. See K.S.A. 2021 Supp. 21-6817(a)(3). The sentencing court indicated it was familiar with the of case and imposed the standard sentence that both parties requested. We cannot say the sentencing court abused its discretion.

Affirmed.