

NOT DESIGNATED FOR PUBLICATION

No. 126,329

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

JONATHON G. ELLIOTT,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

Submitted by the parties for summary disposition under K.S.A. 2022 Supp. 21-6820(g) and (h).

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

PER CURIAM: Jonathon G. Elliott appeals his sentence following his convictions of aggravated criminal sodomy and aggravated indecent solicitation of a child. We granted Elliott's motion for summary disposition under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). For the reasons stated below, we affirm Elliott's sentence.

Elliott pleaded guilty to aggravated criminal sodomy, an off-grid felony, and aggravated indecent solicitation of a child, a severity level 5 felony, for crimes he committed between July 2015 and April 2017. The plea negotiations recommended concurrent sentences and allowed Elliott to "seek any other legal sentence which the [S]tate will oppose." Elliott did not file a departure motion before the sentencing hearing.

At the sentencing hearing, the State asked that Elliott receive a presumptive life sentence with the possibility of parole after 25 years for the off-grid sodomy conviction, concurrent with a 32-month sentence for the solicitation conviction. Elliott's counsel only asked the district court to follow the plea agreement. For his allocution, Elliott recited a Bible verse, but he did not speak to his sentence. The district court stated: "I will follow the plea agreement and impose a life sentence with the minimum of 25 years for [aggravated criminal sodomy]; 32 months for [indecent solicitation.] I will run those concurrently. So life with 25 years is the sentence."

Elliott's only claim on appeal is that the district court "abused its discretion when it failed to impose a departure sentence that was supported by substantial and compelling mitigating circumstances." He claims on appeal the record shows at least two mitigating circumstances: (1) his lack of significant criminal history and (2) his age of 18 when the crimes were committed. The State points out that Elliott did not request a departure and did not argue any mitigating circumstances at his sentencing hearing.

Under Jessica's Law, the presumptive sentence for the crime of aggravated criminal sodomy of a child is life imprisonment with a mandatory minimum sentence of 25 years. K.S.A. 2015 Supp. 21-6627(a)(1)(D). The district court must impose the mandatory presumptive sentence "unless the judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure." K.S.A. 2015 Supp. 21-6627(d)(1). Normally, we review a district court's decision on whether to grant a durational departure in a Jessica's Law case for an abuse of discretion. *State v. Jolly*, 301 Kan. 313, 324-25, 342 P.3d 935 (2015). A judicial action constitutes an abuse of discretion if: (1) no reasonable person would take the view adopted by the district court; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Willis*, 312 Kan. 127, 133, 475 P.3d 324 (2020). The party alleging an abuse of discretion bears the burden of proving it. *State v. Powell*, 308 Kan. 895, 910, 425 P.3d 309 (2018).

Elliott did not request a departure and therefore did not raise this issue in the district court. Generally, an appellant cannot raise an issue on appeal when it was not raised in district court. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Exceptions exist, but the appellant must explain why the issue is properly raised for the first time on appeal. 309 Kan. at 995; Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). Elliott concedes that he did not move for a departure sentence in the district court but does not argue why the issue may be reviewed for the first time on appeal.

Elliott does not present this court with a decision to review. Because he never requested a departure, the district court neither considered the issue nor entered any findings or a ruling on the matter. This court cannot decide whether the district court abused its discretion when the court did not exercise any discretion. See *Manhattan Ice and Cold Storage v. City of Manhattan*, 294 Kan. 60, 81, 274 P.3d 609 (2012) ("Without a ruling from the district court on this issue, we cannot proceed with formless appellate review."); *State v. Stokes*, No. 122,154, 2021 WL 1703600, at \*2 (Kan. App. 2021) (unpublished opinion) (applying this rule to a defendant's claim for the failure to grant a durational departure that she never requested).

Even if we overlook the lack of preservation, Elliott fails to show that he is entitled to any relief in this appeal. Elliott cites no authority suggesting that a district court, upon sentencing a defendant in a Jessica's Law case, must *sua sponte* consider a departure to a grid sentence. And the burden is on Elliott to show that the district court's decision was an abuse of discretion. Elliott does not elaborate on how his age and lack of significant criminal history amounts to substantial and compelling reasons supporting a departure sentence. The record for our review does not show that the district court abused its discretion by sentencing Elliott to the presumptive term of life imprisonment with a mandatory minimum sentence of 25 years for his aggravated criminal sodomy conviction.

Affirmed.