

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,005

STATE OF KANSAS,
Appellee,

v.

EDROY D. TAYLOR JR.,
Appellant.

SYLLABUS BY THE COURT

1.

Kansas' criminal restitution statute, K.S.A. 2022 Supp. 21-6604(b)(1), provides that a sentencing court shall order restitution, including damage or loss caused by the defendant's crime. Such restitution shall be due immediately unless: (1) the sentencing court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (2) the sentencing court finds compelling circumstances that would render restitution unworkable, either in whole or in part.

2.

Kansas' criminal restitution statute makes clear that an order imposing restitution is the rule and a finding that restitution is unworkable is the exception.

3.

When a defendant challenges the workability of restitution, the burden of proof lies with the defendant to show compelling circumstances that would render restitution unworkable, either in whole or in part. To sustain that burden, defendants must generally present evidence of their inability to pay when the financial obligation is due.

4.

An appellate court reviews a district court's decision on the workability of a restitution plan for an abuse of discretion. The party asserting error has the burden of showing an abuse of discretion.

5.

While sworn testimony may be more credible than unsworn responses, a district court is not precluded from considering—and even relying on—the responses it has elicited at sentencing.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 27, 2021. Appeal from Shawnee District Court; JASON GEIER, judge. Opinion filed June 9, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Caroline M. Zuschek, of Capital Appellate Defender Office, argued the cause and was on the brief for appellant.

Michael R. Serra, assistant solicitor general, argued the cause, and *Michael J. Duenes*, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: Edroy D. Taylor Jr. appeals the decision of a Court of Appeals panel upholding a restitution plan imposed by the district court after Taylor pleaded guilty to aggravated robbery of a vehicle. Under the district court's plan, Taylor owes nearly \$2,000 in restitution, payable in monthly installments of \$15 while he serves a 100-month prison sentence. Taylor does not challenge the total restitution amount. Instead, he argues the payment plan is unworkable because there is no evidence showing that he could make the \$15 monthly payments while in prison.

But Kansas statutes provide that restitution shall be imposed and due immediately in criminal cases, unless the district court orders installment payments or finds compelling circumstances that would render restitution unworkable, in whole or part. In other words, restitution is the rule and unworkability is the exception.

Thus, the burden is on Taylor to come forward with evidence showing compelling circumstances that would render the \$15 monthly payment plan unworkable. Although Taylor told the district court he lacked substantial assets at the time of sentencing, he presented no evidence showing that he would be unable to make his \$15 monthly payments while incarcerated. We therefore hold that Taylor has not met his burden to prove the restitution plan unworkable, and we affirm the panel's decision.

FACTS AND PROCEDURAL HISTORY

In March 2020, Taylor pleaded guilty to aggravated burglary of a vehicle as part of a plea agreement with the State. In exchange for that guilty plea, the State dismissed two other felonies and a misdemeanor. The facts underlying those offenses are not relevant to this appeal. The only dispute here is about the workability of the district court's restitution plan.

Based on Taylor's criminal history score and the severity of the crime, Taylor's presumptive sentence under the Kansas Sentencing Guidelines Act was between 114 and 128 months in prison. See K.S.A. 2019 Supp. 21-6804(a). But Taylor asked the district court to depart from the presumptive sentence and impose a shorter prison term. At a sentencing hearing, the district court granted Taylor's motion and imposed a 100-month prison sentence. See K.S.A. 2022 Supp. 21-6815(a) (Authorizing a court to impose a departure sentence for "substantial and compelling reasons.>").

After announcing Taylor's prison term, the district court addressed restitution. The court ordered \$1,954.36 in restitution payable to the victim and then asked defense counsel if she wanted to address Taylor's ability to pay. Defense counsel asked the court to waive attorney fees and all other fees except restitution, which she said were substantial and would be difficult to pay. After questioning Taylor directly, the court found that Taylor had minor children he was financially responsible for and that he lacked substantial assets.

The court then solicited recommendations on a payment plan from the parties. Defense counsel asked to delay restitution payments until Taylor was released from prison because payments during incarceration were "totally unworkable." The State disagreed and argued that if Taylor could pay about \$20 per month while in prison, restitution would be complete by the time he finished his 100-month sentence—though the State conceded that it did not know if such a plan was "feasible or doable." When given an opportunity to respond, defense counsel declined. The court ordered Taylor to pay restitution in installments of \$15 per month starting the next month.

But the next day, Taylor moved to amend the restitution plan. He again asked for restitution to start upon his release from prison, arguing that there was "no conceivable way" the plan was workable given his prison sentence and his present lack of resources. In response, the State suggested that Taylor could earn money in prison. The district court denied Taylor's motion, finding that the evidence showed only that Taylor could not pay restitution in full at sentencing, not that he would be unable to make limited income while incarcerated and apply that income towards his monthly payments.

On appeal to a panel of the Court of Appeals, Taylor argued the district court had abused its discretion in formulating the payment plan. In Taylor's view, because no evidence showed he could pay restitution while incarcerated, the district court's decision had turned on a factual error. See *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021)

(A judicial action based on a factual error is an abuse of discretion.). The panel disagreed and upheld the payment plan, emphasizing that under Kansas law, the burden was on Taylor to present evidence showing that the plan was unworkable. *State v. Taylor*, No. 123,005, 2021 WL 3823437, at *2-3 (Kan. App. 2021) (unpublished opinion). According to the panel, the only evidence before the district court was Taylor's responses to the court's questions and his assertion that his prison sentence prohibited him from paying while incarcerated. And in the panel's view, that evidence failed to establish that the plan was unworkable. 2021 WL 3823437, at *3. The panel also stated that because the district court had tried "to align Taylor's repayment plan with the goals of restitution," the plan was not objectively unreasonable. 2021 WL 3823437, at *3. And citing our decision in *State v. Holt*, 305 Kan. 839, 844, 390 P.3d 1 (2017), the panel questioned the evidentiary value of Taylor's colloquy with the district court because Taylor had not been sworn in as a witness. 2021 WL 3823437, at *3.

We granted Taylor's petition for review and held oral arguments on the matter during our October 2022 docket. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

To resolve Taylor's challenge, we first identify the controlling legal framework and standard of review. Then, we apply that framework to the dispute at hand and conclude that Taylor failed to satisfy his burden to show error.

As to the proper legal framework, the Legislature has incorporated restitution as a component of criminal sentencing in K.S.A. 2022 Supp. 21-6604. The district court's authority in addressing restitution is outlined in subsection (b)(1), which provides that:

"[T]he court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1).

The plain language reflects that "[r]estitution is the rule and a finding that restitution is unworkable is the exception." *Holt*, 305 Kan. at 842. Thus, the burden is on the defendant to show compelling circumstances that would render restitution unworkable, in whole or part. *State v. Meeks*, 307 Kan. 813, 816-17, 415 P.3d 400 (2018). To meet that burden, defendants must generally present evidence of their inability to pay at the time the financial obligation is due. 307 Kan. 813, Syl. ¶ 2; *Holt*, 305 Kan. at 842; *State v. Alcala*, 301 Kan. 832, 840, 348 P.3d 570 (2015). Absent that evidence, the restitution order is presumed to be workable.

Whether a district court's plan of restitution is unworkable is reviewed on appeal for an abuse of discretion. *State v. Shank*, 304 Kan. 89, 93, 369 P.3d 322 (2016). A district court abuses its discretion when its decision turns on a legal or factual error or when its ruling is objectively unreasonable. *Meeks*, 307 Kan. at 816. Although the panel elected to address reasonableness, Taylor has not argued on appeal that no reasonable person could agree with the plan. Nor has he argued that a legal error occurred. Instead, Taylor argues only that the district court committed a factual error. As the party asserting an abuse of discretion, Taylor has the burden of establishing error. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

A factual error is an abuse of discretion when the record does not support a factual finding on which a legal conclusion or an exercise of discretion is based. *State v. Wilson*, 301 Kan. 403, Syl. ¶ 2, 343 P.3d 102 (2015). Taylor argues that there is no evidentiary basis to conclude that he could pay any amount in restitution during his incarceration. He

therefore contends that the district court's factual finding that he could pay \$15 per month is not supported by substantial competent evidence. And because that factual finding allegedly supported the district court's ultimate legal conclusion that the plan was workable, Taylor believes the district court abused its discretion. He asks us to vacate the restitution plan and remand his case to the district court with directions for payments to begin when he is released from prison or to make payments contingent upon employment at his correctional facility.

We disagree with Taylor's framing of the argument as one of factual error. Under the controlling legal framework outlined above, neither the State nor the district court have the burden to point to evidence in the record that shows the district court's installment plan is *workable*. As the statute and our precedent makes clear, the burden is on Taylor to present some evidence showing the plan is *unworkable*. *Meeks*, 307 Kan. 813, Syl. ¶ 2. So we must ask, as the panel did, whether Taylor's evidence establishes that the plan is unworkable.

As the panel pointed out, the evidence presented by Taylor is slim. In response to questions posed by the district court about his financial circumstances, Taylor said he had children to support, but he did not have cash, a home, a car, or any bank accounts. Citing our decision in *Holt*, the panel questioned whether it could give much, if any, weight to these answers, suggesting that a defendant's unsworn "testimony" at a sentencing hearing is not "real evidence" but merely an affirmative response to the court's questioning. *Taylor*, 2021 WL 3823437, at *3 (citing *Holt*, 305 Kan. at 844). Sworn testimony may certainly be more credible than unsworn responses. But *Holt* does not preclude a court from considering—and even relying on—the responses it has elicited from the parties at sentencing. Here, the district court properly relied on Taylor's responses regarding his poverty status to find that Taylor had minor children he was financially responsible for and that he lacked substantial assets. In turn, the district court relied on these findings to

conclude that restitution should be repaid in specified installments, rather than ordering the entire amount due immediately, as the statutory scheme contemplates in most instances.

Aside from his responses to the district court's questions, Taylor presented no evidence about his ability to make those monthly restitution payments. He did not introduce evidence about the likelihood of securing employment while incarcerated, the daily wages he might expect from such employment, or other expenses he expected to incur while incarcerated. Fortunately for defendants, they need not possess clairvoyance or rely on any other sixth sense to obtain such information, as the dissent suggests. Much of it is readily available in the Internal Management Policies and Procedures of the Kansas Department of Corrections, which the Department is required to publish under K.A.R. 123-2-110 and is readily available on its website. While the parties agree that Taylor lacked the assets to pay restitution in full at the time of sentencing, he simply failed to put on any evidence showing he would be unable to make the \$15 monthly payments while incarcerated. See *Shank*, 304 Kan. at 96 (defendant failed to meet burden to show unworkability by failing to present evidence of his inability to pay restitution at the time it would be due); *Alcala*, 301 Kan. at 840 (same). In short, Taylor's responses alone would not compel a reasonable jurist to conclude that the \$15 monthly payment plan was unworkable.

Taylor has the burden to show the plan is unworkable—neither the State nor the court must show that the plan is workable. As a result, we agree with the panel: "With the dearth of evidence presented here, we hold that Taylor has not met his burden to show that the restitution plan is unworkable." *Taylor*, 2021 WL 3823437, at *3.

Affirmed.

* * *

STANDRIDGE, J., dissenting: I agree with the majority on the applicable law but disagree with the majority's application of the law to the specific facts presented in this case. Based on the facts presented, no reasonable person would agree that requiring Taylor to pay \$15 per month while serving his prison sentence is a workable restitution plan. As such, the district court abused its discretion. For this reason, I respectfully dissent.

As set forth by the majority, once a district court determines a restitution amount, the amount is due immediately unless:

"(A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or

"(B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1).

The defendant bears the burden to show compelling circumstances that repaying restitution—either generally or in the method proposed by the State or the court—would not work. An appellate court reviews a district court's decision on the unworkability of a restitution plan for an abuse of discretion. A district court abuses its discretion when its decision is based on an error of fact or law or when no reasonable person would agree with its decision. *State v. Meeks*, 307 Kan. 813, 816, 415 P.3d 400 (2018).

At sentencing, the district court ordered Taylor to pay \$1,954.36 in restitution beginning in July 2020, the month immediately following sentencing, at the rate of \$15 per month. Taylor did not challenge the restitution *amount* but opposed the *manner* in which he was ordered to pay it—specifically, the requirement that he pay \$15 per month

while incarcerated during his 100-month prison sentence. Taylor advised the court at the sentencing hearing that he had no cash, no bank account, no car, no home, and some child-support obligations. When asked by the court for recommendations on a restitution payment plan, defense counsel reiterated Taylor had no money and no ability to get a job and earn money until released from prison and therefore the restitution plan would be "totally unworkable at this point."

In response, the State disagreed with Taylor's claim of unworkability:

"I don't think it's totally unworkable. I think if I did my math correctly, if he were to pay \$19.54 every month for the next 100 months that he's in prison, it would be paid off by the time he's out [of] prison. *I don't know if that's feasible or doable*, but at least it would basically be 20 bucks a month for the . . . hundred months that he's going to be in custody." (Emphasis added.)

Asked if she wanted to add any additional information for consideration by the court, defense counsel declined, likely because (1) the State's proposed payment plan focused on a mathematical formula to calculate monthly payments based on the total restitution amount due and the number of months Taylor would be in custody and (2) the State acknowledged its uncertainty about whether the proposed payment plan was "feasible or doable" given Taylor's circumstances.

Despite concerns from both parties about feasibility and unworkability of the payment plan in terms of Taylor's present and future ability to make monthly payments toward restitution while incarcerated, the court adopted a modified version of the State's mathematical formula based on the total restitution owed and the length of Taylor's sentence: "Based upon the length of incarceration, the Court's going to order restitution to be payable in the amount of \$15 per month beginning in July of 2020." The court then noted that if "the Court needs to readdress [the restitution payment plan] in the future, [defense counsel] can always bring it to the court's attention."

Taylor moved to amend the restitution payment plan the next day. In his motion, he asked the court to enter an amended order deferring commencement of monthly restitution payments until his release from prison. In support, Taylor reiterated he had no cash, no bank account, no car, no home, and "no conceivable way [to] make this plan workable."

The State opposed Taylor's motion to amend. Relevant here, it argued Taylor failed to show the current restitution plan was unworkable "*because he can earn an income in prison and friends or family can put money on his books that can be applied toward the restitution order.*" (Emphasis added.) The record contains no evidence to support the State's argument.

But the district court was persuaded by the State's response and denied Taylor's motion. In its order, the court began by acknowledging Taylor's pretrial jail confinement and current indigency (no income or assets) presented compelling circumstances to establish the unworkability of an order requiring him to pay restitution, in full, immediately. Notwithstanding these compelling circumstances, the court concluded Taylor failed to show he would be unable to make monthly \$15 restitution payments for 100 months while serving his prison sentence. Specifically, the court held Taylor failed to *affirmatively* prove he "would *not* be able to make limited income while incarcerated and apply that towards the court ordered \$15.00 monthly payments."

Taylor appealed and a panel of the Court of Appeals affirmed. Today, a majority of the court affirms the panel and the district court. Preliminarily, the majority implicitly agrees with the district court that Taylor's pretrial jail confinement and indigency at the time of sentencing presented compelling circumstances to establish the unworkability of an order requiring him to pay restitution, in full, immediately. Although compelling at the

time of sentencing, the majority nevertheless concludes these circumstances are not compelling to establish the unworkability of an order requiring restitution payments of \$15 per month, *effective immediately after sentencing*. In support of its conclusion, the majority cites Taylor's failure to "introduce evidence about the likelihood of securing employment while incarcerated, the daily wages he might expect from such employment, or other expenses he expected to incur while incarcerated." Slip op. at 8. In the absence of this evidence, the majority holds the district court did not abuse its discretion by ordering the \$15 monthly restitution payments because no reasonable judge would find confinement and indigency *at the time of sentencing* compelling enough to establish the unworkability of monthly restitution payments that come due *in the month immediately after sentencing*.

I disagree with the majority and would find the district court abused its discretion in ordering Taylor to pay \$15 per month while incarcerated in prison because no reasonable judge would agree this restitution payment plan is workable.

The defendant bears the burden to show "compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2022 Supp. 21-6604(b)(1)(B). The statute does not define "unworkable." Given this lack of definition, this court has held that the Legislature did not intend a rigid or unyielding definition and that unworkability should be evaluated on a case-by-case basis. *Meeks*, 307 Kan. at 819-20. But when a statute does not define a term, we also have held the court must attempt to determine legislative intent by giving common words their ordinary meanings. Dictionary definitions are good sources to determine the ordinary meaning of common words. *Midwest Crane & Rigging, LLC v. Kansas Corp. Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017).

Black's Law Dictionary does not define "unworkable" but does have a definition for "workable": "adj. (1865) (Of a plan, system, strategy, etc.) practical and effective; feasible." Black's Law Dictionary 1924 (11th ed. 2019). In turn, practical and effective also are defined:

"practical adj. (15c) 1. Real as opposed to theoretical; of, relating to, or involving real situations and events rather than ideas, emotions, or idealized situations <for practical purposes>. 2. Likely to succeed or be effective <a practical alternative>. 3. Useful or suitable for a particular purpose or situation <a well-drafted indemnity clause may be the most practical solution>. 4. (Of a person) good at dealing with problems and making decisions based on what is possible and will actually work <she tried to be practical and figure out a solution>." Black's Law Dictionary 1418 (11th ed. 2019).

"effective adj. (14c) 1. (Of a statute, order, contract, etc.) in operation at a given time <effective June 1>. • A statute, order, or contract is often said to be effective beginning (and perhaps ending) at a designated time. 2. Performing within the range of normal and expected standards <effective counsel>. 3. Productive; achieving a result <effective cause>." Black's Law Dictionary 651 (11th ed. 2019).

Given the definition encompasses feasibility and the State's acknowledgment at sentencing that it was uncertain about whether the proposed payment plan was "feasible or doable" given Taylor's circumstances, it appears Taylor—at the very least—may have persuaded the State that the plan was unworkable. Consistent with the dictionary definition above, it bears repeating that the parties, the district court, the Court of Appeals panel, and the majority all implicitly find Taylor's pretrial jail confinement and indigency *at the time of sentencing* presented compelling circumstances to establish the unworkability of a plan to pay restitution, in full, immediately. And not surprisingly, the district court declined to make the first monthly restitution payment due on the day of sentencing, presumably because such a payment would have been unworkable given Taylor was in custody, had no cash, no bank account, no car, no home, and some

responsibility for child support. Yet the court went on to find workable a restitution payment plan of \$15 per month, effective the month immediately after sentencing, which was just three weeks later. According to the district court, the sole reason for finding the future restitution payment plan workable is based on Taylor's failure to show he would not be able to make limited income while incarcerated.

Short of presenting the testimony of a psychic with the ability to divine the likelihood of Taylor securing employment while incarcerated, the daily wages he might expect from such employment, and expenses Taylor would incur while incarcerated, I cannot imagine what evidence the majority expected Taylor to present. Moreover, Taylor's ability to obtain employment and the amount of any earnings are both circumstances beyond Taylor's control. Taylor cannot control which prison he is assigned to serve his sentence. Taylor cannot control whether he will obtain employment at the prison to which he is assigned. Even if he does obtain employment, Taylor does not control how many hours he will work or the wages he will receive.

In the absence of a supernatural intervention, it appears the majority might have found persuasive a submission by Taylor presenting statistical information from the Kansas Department of Corrections (KDOC) regarding the likelihood that a prisoner will obtain employment while incarcerated, the average monthly wage the prisoner might be expected to earn if employed, and the average monthly expense incurred by a prisoner to maintain hygiene and other necessities. But putting the burden on Taylor to present such information is unrealistic and impractical given that the KDOC likely gathers and retains this statistical information internally, if it does so at all.

Even if he could use his criminal case to subpoena the information, the statistics are averages and have minimal value in deciding unworkability because they do not

consider Taylor's individual and unique circumstances, which contravenes our directive that "unworkability should be evaluated on a case-by-case basis." *Meeks*, 307 Kan. at 820.

"District courts should use this flexible guideline to evaluate each defendant's unique circumstances before deciding whether the defendant has shown a plan would be unworkable. Some of the factors relevant to the court's inquiry will be the defendant's income, present and future earning capacity, living expenses, debts and financial obligations, and dependents. In some circumstances, the amount of time it will take a defendant to pay off a restitution order will also be relevant, especially if the defendant is subject to probation until the restitution is paid in full. In all circumstances, the district court should keep in mind the ultimate goals of restitution: compensation to the victim and deterrence and rehabilitation of the guilty." *Meeks*, 307 Kan. at 820.

Applying this flexible guideline for unworkability to Taylor's individual and unique circumstances yields the following results:

Income

Taylor has no income.

Present and future earning capacity

Taylor currently is in custody and unemployed and has no way to establish his future earning capacity during the 100 months he will spend in prison.

Living expenses

Taylor has no way to establish his future living expenses while confined in prison.

Debts and financial obligations

Taylor has some financial responsibility for child support.

Dependents

Taylor has dependent children.

Amount of time to pay off restitution order

The State and the district court focused exclusively on this factor in fashioning a restitution payment plan that could be paid off at the time Taylor is released from prison by using a mathematical formula to calculate monthly payments based on the total restitution amount due and the number of months in custody.

Purposes of restitution; victim compensation and offender deterrence and rehabilitation

Imposing an unachievable monthly restitution payment plan does not align with the purpose of restitution because its effect is offender punishment instead of deterrence and rehabilitation. Conversely, deferring the monthly restitution payments until Taylor has the ability to earn money upon release from prison balances the competing interests of payment to the victim and offender deterrence and rehabilitation without punishment.

In sum, the majority agrees Taylor presented compelling circumstances (no assets and no job) to find unworkable a plan for whole or partial restitution payments at the time of sentencing. Although Taylor had no way to predict, speculate, or control whether his financial situation would change in the next three weeks or the next 100 months, the majority placed an impossible burden on Taylor to show he would not be able to earn income as soon as he was placed in prison. Based on the facts presented showing

indigency, lack of assets, and lack of employment, no reasonable judge would find workable the restitution plan requiring Taylor to pay \$15 per month, beginning 3 weeks after sentencing and continuing for the next 100 months. Accordingly, I would find the district court abused its discretion and remand the matter for the district court to enter a workable order of restitution.

ROSEN and WILSON, JJ., join the foregoing dissenting opinion.