

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,382

STATE OF KANSAS,
Appellee,

v.

ALLEN LEE BUSCH,
Appellant.

SYLLABUS BY THE COURT

1.

Under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii), a prior out-of-state felony must be classified as a nonperson felony if the elements of the out-of-state offense do not require proof of any of the circumstances listed in subsections (B)(i) or (ii).

2.

Under K.S.A. 2021 Supp. 21-6814(b), a presentence investigation report may be considered at sentencing by the district court to determine whether the State's burden of proof has been satisfied regarding an offender's criminal history.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 22, 2022. Appeal from Seward District Court; CLINT B. PETERSON, judge. Opinion filed May 5, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.

Jennifer C. Roth, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Russell W. Hasenbank, county attorney, argued the cause, and *Derek Schmidt*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Allen Lee Busch claims that, as a result of errors in the classification of five of his prior out-of-state convictions, he is serving an illegal sentence. Under the new statutory test for the classification of prior crimes, we agree in part, although not precisely for the reason Busch articulates. For the reasons we will discuss, we affirm in part and reverse in part the decision of the Court of Appeals, affirm in part and vacate in part the judgment of the district court, and remand the matter to the district court for resentencing.

FACTS AND PROCEDURAL BACKGROUND

In 2019, the State charged Busch with one count each of possession of methamphetamine, possession of oxycodone, and possession of drug paraphernalia. Busch pleaded no contest to possession of methamphetamine. In exchange, the State recommended probation and dismissed the remaining charges.

The State, the district court, and Busch's counsel all received copies of the court-ordered presentence investigation report (PSI) before sentencing. Among the 35 prior crimes listed in the report, the PSI documented the following adult person felonies: three instances of burglary in 1985, one instance of criminal trespass in 1989, and one instance of burglary third degree in 1995, all of which arose from convictions in New Jersey. In

each of these, the PSI writer had added the term "residential" in parentheses behind the name of the offense.

At sentencing, neither party challenged any aspect of the PSI, and Busch himself agreed that he had a criminal history score of A. The district court granted a dispositional departure to probation for 18 months with an underlying 40-month prison sentence.

The State moved to revoke Busch's probation in June 2020, arguing that Busch had failed to report and had failed to refrain from possessing or consuming alcohol or illegal drugs. At a probation revocation hearing, Busch stipulated to these violations. The district court found that the violations were "significant" and ordered Busch to serve the rest of his underlying sentence. In its Journal Entry of Probation Revocation, the district court incorrectly noted that it revoked Busch's probation because he had "absconded." Busch then appealed.

On appeal, Busch argued that the State failed to prove his prior New Jersey convictions were person felonies, thus rendering his sentence illegal. *State v. Busch*, No. 123,382, 2022 WL 2904026, at *2 (Kan. App. 2022). He also claimed the district court abused its discretion by ordering him to serve his underlying sentence and pointed out an error in the district court's journal entry of probation revocation. 2022 WL 2904026, at *4-5. The panel rejected the first two arguments but agreed that the district court committed a clerical error by noting that Busch had "absconded" and remanded with directions to correct the error. 2022 WL 2904026, at *5. After reciting the text of the New Jersey burglary statute, the panel focused on K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(h) and K.S.A. 2019 Supp. 21-6814(b):

"K.S.A. 2019 Supp. 21-6814 addresses the legal bearing that PSI reports have on sentencing proceedings. Under that statute, 'the summary of the offender's criminal history prepared for the court by the state shall satisfy the state's burden of proof regarding an offender's criminal history unless the defendant objects in writing.' So, although the New Jersey statute at issue encompasses conduct broader than the person crime circumstance listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(h), the description of the offense on the PSI clarifies that Busch's conviction involved a residential burglary. K.S.A. 2019 Supp. 21-6814(b) does not distinguish between the 'statute' and 'description' columns on the criminal history worksheet; it covers the entire report. Again, Busch did not file a written objection to this description of his prior offense, so the State's description of the New Jersey burglary offense as a residential crime—which matches the corresponding person crime circumstance—satisfied its burden of proof.

"The same analysis applies to Busch's criminal trespass conviction. [Citations omitted.]" 2022 WL 2904026, at *4.

Bush petitioned for review of his illegal sentence and abuse of discretion claims. We granted review only as to his illegal sentence claim.

ANALYSIS

Bush advances two related arguments challenging the classification of his four previous New Jersey burglary convictions and his single New Jersey criminal trespass conviction. First, Bush argues that the court services officer's "residential" notation beside his New Jersey convictions on the PSI does not provide substantial competent evidence to support classifying these convictions as person felonies. Second, he claims that the panel's decision effectively permitted the district court to engage in unconstitutional factfinding, in violation of the Sixth Amendment to the United States Constitution.

Standard of review

"An appellate court reviews a district court's decision that the State met its burden to prove the classification of a prior conviction for substantial competent evidence." *State v. Corby*, 314 Kan. 794, 796, 502 P.3d 111 (2022). When a challenge to a criminal history score involves the interpretation of a statute, the court's review is unlimited. 314 Kan. at 796.

"The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity."

"An apparently clear statute may nevertheless manifest ambiguity when applied to the particular facts of a case. [Citations omitted.]" *State v. Scheuerman*, 314 Kan. 583, 587, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022).

Constitutional overlay

We begin with Busch's "constitutional" argument. We pause to note that, although Busch styles this claim as a "constitutional problem," a motion to correct an illegal sentence usually cannot encompass a constitutional challenge. E.g., *State v. R. H.*, 313 Kan. 699, 702, 490 P.3d 1157 (2021). In any event, Busch essentially argues that his sentence does not conform to K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h)—an argument

that, as we have clarified, is a challenge "to the statutory propriety of the classification at issue—albeit with a thick overlay of constitutional law." *State v. Dickey*, 305 Kan. 217, 221, 380 P.3d 230 (2016) (*Dickey II*). Consequently, Busch's argument remains a valid claim for a motion to correct an illegal sentence.

Busch's prior out-of-state burglary convictions were nonperson felonies.

We next review the relevant provisions of K.S.A. 2022 Supp. 21-6811(e):

"(e)(1) Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history.

....

(3) The state of Kansas shall classify the crime as person or nonperson.

...

(B) In designating a felony crime as person or nonperson, the felony crime shall be classified as follows:

(i) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a person felony if one or more of the following circumstances is present *as defined by the convicting jurisdiction in the elements of the out-of-state offense*:

....

(h) entering or remaining within any residence, dwelling or habitation.

....

(iii) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, *shall be classified as a nonperson felony if the elements of the offense do not require proof of any of the circumstances in subparagraph (B)(i) or (ii).*" (Emphases added.)

This statute clarifies that the appropriate classification for Busch's New Jersey crimes as person or nonperson felonies turns on the *elements* in New Jersey of each crime. The following statute defined the elements applicable to Busch's 1985, 1989, and 1995 burglary convictions:

"(a) . . . A person is guilty of burglary if, with purpose to commit an offense therein he:

- (1) Enters a structure, or a separately secured or occupied portion thereof, unless the structure was at the time open to the public or the actor is licensed or privileged to enter; or
- (2) Surreptitiously remains in a structure or a separately secured or occupied portion thereof knowing that he is not licensed or privileged to do so.

"(b) Grading. Burglary is a crime of the second degree if in the course of committing the offense, the actor:

- (1) Purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone; or
- (2) Is armed with or displays what appear to be explosives or a deadly weapon.

"Otherwise burglary is a crime of the third degree. . . ." N.J. Stat. Ann. § 2C:18-2 (West 1981).

(This version remained in effect from 1981 to 1994. In January 1995, the New Jersey Legislature amended the statute to include entry into a "research facility," though this does not affect our analysis. 1995 N.J. Sess. Law Serv. ch. 20, § 3 [West].) Additionally, N.J. Stat. Ann. § 2C:18-1 (West 1981) defined "structure" at all relevant times to mean "any building, room, ship, vessel, car, vehicle or airplane, and also means any place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." Plainly, this definition of "structure" is far

broader than the "residence, dwelling or habitation" criteria set forth in K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h). The elements of the New Jersey crime are satisfied if a residence is burgled, but they are also satisfied if a car is burgled. In other words, the elements do not *require* a residence to be burgled for a valid conviction of burglary.

K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii) clarifies our course when an out-of-state statute's definitions of a particular element may broadly encompass, but not *require*, proof of a particular fact or circumstance: "An out-of-state conviction . . . for the commission of a felony offense . . . shall be classified as a nonperson felony if the elements of the offense do not *require* proof of any of the circumstances in subparagraph (B)(i) [burglary of a "residence, dwelling, or habitation] or (ii) [not applicable]." (Emphasis added.) A close inspection of New Jersey's statute shows that no version of its elements of burglary *requires* proof that the enclosed structure burgled was a "residence, dwelling or habitation." Thus, the plain language of K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii) mandates that Busch's New Jersey burglary crimes must be scored as nonperson felonies. The panel erred by concluding otherwise, no matter if the State carried its burden of proof by showing that the *facts* surrounding Busch's prior burglaries involved residences.

Busch's prior out-of-state criminal trespass conviction was a person felony.

We next consider the defendant's New Jersey conviction for criminal trespass, designated on the PSI as a person felony. Preliminarily, we reject Busch's claim that the State failed to carry its burden of proof that this crime involved a residence because a court services officer—not the prosecutor—prepared the PSI. Although K.S.A. 2021 Supp. 21-6814(b) provides that "the summary of the offender's criminal history prepared for the court *by the state* shall satisfy the state's burden of proof regarding an offender's

criminal history," K.S.A. 2022 Supp. 21-6813(a) directs the district court to "order the preparation of the presentence investigation report by the court services officer"—a report that includes a criminal history worksheet. (Emphasis added.) Despite the difference in the identity of the preparer, nothing in the statute suggests that a PSI prepared by a court services officer, instead of a separate summary prepared by the State, is required. Cf. *State v. Schow*, 287 Kan. 529, 537, 197 P.3d 825 (2008) (describing K.S.A. 21-4715, the predecessor of K.S.A. 21-6814, as "address[ing] the legal effect of the PSI report on the sentencing proceedings"). The PSI provided evidence the district court could consider when determining whether the State had carried its burden of proof.

Unlike the burglary convictions, at least one version of the New Jersey criminal trespass statute contains an element involving dwellings:

"A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any structure, or separately secured or occupied portion thereof. An offense under this subsection is a crime of the fourth degree if it is committed in a dwelling. Otherwise it is a disorderly persons offense." N.J. Stat. Ann. § 2C:18-3(a) (West 1981).

Thus, the crime of criminal trespass could be properly scored as a person felony if the State carried its burden of proving that an element of "entering or remaining within any residence, dwelling or habitation" was present, as required by K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(h). As we have held, the State met this burden from its specific designation on the PSI that this conviction was for a residential criminal trespass, specifically, criminal trespass of the fourth degree. Thus, the district court was correct in scoring this crime for sentencing purposes as a person felony.

Defendant did not object to the summary of the New Jersey criminal trespass conviction as set forth on the PSI. Nor did he provide evidence at sentencing to refute that summary. The State thus carried its burden at sentencing to show this conviction should be scored as a person felony.

CONCLUSION

The district court erred when it scored Busch's burglary convictions as person felonies, but it correctly scored his criminal trespass conviction as a person felony. On remand for resentencing, we note that nothing in this opinion precludes Busch from objecting to the person felony designation of his prior criminal trespass conviction should he elect, in good faith, to do so.

We affirm in part and reverse in part the judgment of the Court of Appeals, affirm in part and vacate in part the judgment of the district court, and remand the matter for resentencing.