NOT DESIGNATED FOR PUBLICATION

No. 124,459

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RONALD W. MCDANIEL,
Appellant.

MEMORANDUM OPINION

Appeal from Crawford District Court; MARY JENNIFER BRUNETTI, judge. Opinion filed April 14, 2023. Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and HURST, JJ.

HURST, J.: Ronald W. McDaniel entered a plea agreement in which the State agreed to recommend a sentence of 60 months' imprisonment, which represented a significant downward durational departure from his presumptive sentence. The district court was dubious of imposing such a lenient sentence. In an effort to assuage the court's concerns, McDaniel requested that the district court impose a sentence of 60 months' imprisonment followed by a lengthy term of probation on the condition that he complete a sex offender therapy program while incarcerated. The district court, unconvinced of its authority to impose such a sentence and unpersuaded that the significant downward

durational departure suggested by both parties was appropriate, sentenced McDaniel to 114 months of imprisonment. McDaniel now appeals, arguing that the district court misunderstood its statutory sentencing authority and thus erred in denying his motion for a downward durational departure. Additionally, and for the first time on appeal, McDaniel argues that the Kansas Offender Registration Act (KORA) is facially unconstitutional under the First Amendment to the United States Constitution. This court finds that the district court properly understood its sentencing authority and declines to address McDaniel's unpreserved constitutional claim. McDaniel's sentence is therefore affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the facts, and the underlying facts supporting McDaniel's conviction are not relevant to this appeal. As part of a plea agreement, McDaniel pled no contest to one count of attempted electronic solicitation on March 30, 2021. In exchange for McDaniel's plea, the State agreed to recommend a downward durational departure to 60 months' incarceration.

On June 7, 2021, McDaniel filed a motion seeking the downward durational departure consistent with his plea agreement. In his motion, McDaniel asserted that, while incarcerated, he could participate in a Kansas Department of Corrections' (KDOC) therapy program for sex offenders and that an employee from the KDOC was willing to testify about the program at sentencing. The following day, the district court conducted the first of two sentencing hearings where McDaniel offered evidence to support his motion for a downward durational departure. An employee of the KDOC testified about the optional sex offender therapy program in which McDaniel could voluntarily participate while incarcerated and confirmed that, because it was voluntary, McDaniel could cease participation at any time. McDaniel testified that he was willing to participate in the program and stated: "I definitely want to take that therapy to help myself out, to

make myself better, and be a better person after all this is over." Following allocution, the State reaffirmed that it agreed to McDaniel's requested downward durational departure to 60 months' incarceration as part of the plea agreement.

The district court then explained that it found the case to be difficult and it believed the State's agreement to the downward durational departure was "quite a concession." The district court expressed difficulty in determining the appropriate sentence, in part, because the KDOC sex offender therapy program was voluntary. However, the court appeared agreeable to granting the downward durational departure *if* it could ensure that McDaniel would complete the KDOC sex offender therapy program while incarcerated. But the court doubted its authority to impose the condition, explaining, "I don't see how the Court can force it." McDaniel offered to brief the issue of whether the district court had the authority to conditionally grant the downward durational departure based on his successful completion of the KDOC sex offender therapy program, and the district court took the matter under advisement and continued sentencing.

On August 13, 2021, McDaniel filed a sentencing memorandum arguing that the district court had the authority to sentence him to longer than 60 months' incarceration but then place him on probation after serving 60 months so long as he completed the KDOC sex offender therapy program while incarcerated. McDaniel argued that the remainder of the sentence would then be the underlying prison sentence of his probation. And because the district court would lose jurisdiction after sentencing, "[a]ll that is required is that the conditions are accurately recorded in the sentencing journal entry."

On September 16, 2021, the district court held the second and final sentencing hearing where the State again recommended that the district court grant the downward durational departure to 60 months' incarceration. McDaniel again argued that the district court had the authority to sentence him to more than 60 months' incarceration but grant

probation after he served 60 months on the condition that he complete the KDOC sex offender therapy program. Ultimately, the district court was not persuaded that it had the authority to impose McDaniel's requested conditional combination sentence: "I'm still not sold that I have that ability."

The district court then denied McDaniel's motion for a downward durational departure and sentenced him to 114 months' incarceration, the mitigated number in the appropriate grid box and a presumptive prison sentence. In sentencing McDaniel, the district court stated:

> "The lowest minimum term which in the opinion of the Court is consistent with public safety, the needs of the defendant and the seriousness of the crime committed, the Court announces that for the primary offense of attempted electronic solicitation, a severity level five person felony offense with a criminal history score of B, the Court will sentence you to the mitigated term of 114 months in the custody of the Secretary of Corrections."

The district court further ordered McDaniel to register as a sex offender. McDaniel stated that he understood he was required to register and made no objection.

McDaniel appealed.

DISCUSSION

I. THE DISTRICT COURT DID NOT MISUNDERSTAND ITS STATUTORY AUTHORITY

McDaniel essentially claims the district court erred because it misunderstood its authority to impose a conditional sentence, even though the ultimate sentence imposed was within the statutory guidelines. As a preliminary matter, the State argues that this court lacks authority to review McDaniel's claim because the district court imposed a

sentence within the statutory presumptive sentencing guidelines. While appellate courts generally lack authority to review felony sentences imposed within the presumptive sentencing guidelines, an exception exists when the district court misunderstood its statutory sentencing authority. K.S.A. 2022 Supp. 21-6820(c)(1) (prohibiting appellate review of sentences within the presumptive sentence for the crime); see *State v. Warren*, 297 Kan. 881, 882-85, 304 P.3d 1288 (2013) (upholding the Court of Appeals reversal of a sentence within the statutory guidelines when the district court misunderstood its statutory authority to impose a downward departure). Under these circumstances, this court considers McDaniel's appeal as "'a question of statutory interpretation rather than a review of a presumptive sentence.'" *Warren*, 297 Kan. at 883 (quoting *State v. Warren*, 47 Kan. App. 2d 57, 59, 270 P.3d 13 [2012]).

This court exercises unlimited review over matters of statutory interpretation, including sentencing statutes. See *State v. Moore*, 309 Kan. 825, 828, 441 P.3d 22 (2019). When interpreting statutes, this court endeavors to give effect to legislative intent as expressed through the plain language of the statute. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018). "The most fundamental rule of statutory interpretation is that legislative intent governs if it can be ascertained." 308 Kan. at 1364.

> "'An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent.'" *Pulliam*, 308 Kan. at 1364 (quoting *State v. Keel*, 302 Kan. 560, Syl. ¶ 6, 357 P.3d 251 [2015]).

This court's analysis begins and ends with the plain text of the statute at issue. At the time of McDaniel's sentencing, the applicable sentencing statute provided:

> "(a) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:
>
> (1) Commit the defendant to the custody of the secretary of corrections if the current crime of conviction is a felony . . . or . . . if confinement is for a misdemeanor, to jail for the term provided by law;
>
> (2) impose the fine applicable to the offense and may impose the provisions of subsection (q);
>
> (3) release the defendant on probation if the current crime of conviction and criminal history fall within a presumptive nonprison category or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate. . . .
>
> (4) assign the defendant to a community correctional services program . . .
>
> (5) assign the defendant to a conservation camp for a period not to exceed six months as a condition of probation followed by a six-month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;
>
> (6) assign the defendant to a house arrest program pursuant to K.S.A. 2021 Supp. 21-6609, and amendments thereto;
>
> (7) order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by K.S.A. 2021 Supp. 21-6602(c), and amendments thereto;
>
> (8) order the defendant to repay the amount . . .
>
> (9) order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court;
>
> (10) order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369, and amendments thereto;
>
> (11) if the defendant is convicted of a misdemeanor or convicted of a felony specified in K.S.A. 2021 Supp. 21-6804(i), and amendments thereto, assign the defendant to work release program . . .

(12) order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 22-2802, and amendments thereto;

(13) impose any appropriate combination of (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) and (12); or

(14) suspend imposition of sentence in misdemeanor cases." K.S.A. 2021 Supp. 21-6604(a).

Pursuant to subsection (a)(13), the sentencing statute permits the district court to "impose any appropriate combination of [paragraphs] (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), and (12)." Therefore, a plain reading of the statute permits the district court to impose any appropriate combination of both incarceration as described in subsection (a)(1) and probation as described in subsection (a)(3). See K.S.A. 2021 Supp. 21-6604(a).

Contrary to McDaniel's claim, he did not simply request a combination of incarceration and probation, but rather he requested a contingent sentence. McDaniel requested a sentence in which he would initially be incarcerated for 60 months, as permitted under subsection (a)(1), and then—only if he successfully fulfilled the condition precedent of completing the KDOC sex offender therapy program—he would be placed on probation under subsection (a)(3). In this contingent sentencing scheme, McDaniel's term of probation would be the remainder of his initial prison sentence. So, unlike a typical sentence where the defendant has a short term of confinement followed by a term of probation, or probation in lieu of incarceration, McDaniel requested a sentence that would have required the district court to sentence him to the full term of incarceration, such as 114 months, in which he would be on probation for the last 54 months. And this probation would only occur if he successfully completed the KDOC sex offender therapy program. Otherwise, he would just serve the full sentence—60 months plus 54 months—confined in prison. While the sentencing statute plainly gives the district court the authority to impose an appropriate combination of incarceration and probation, it does *not* grant the district court the authority to impose a sentence for a

single conviction that includes lengthy incarceration that transitions to probation upon the defendant's demonstrated completion of a special training or education program.

Even if the district court had the statutory authority to impose a special condition allowing McDaniel to transition from incarceration to probation, the question would nevertheless remain whether the sentence was an "appropriate combination" within the meaning of the statute. See K.S.A. 2021 Supp. 21-6604(a)(13). Kansas appellate courts have found that similar combination sentences are not "appropriate" within the meaning of the applicable sentencing statutes. See *State v. McNaught*, 238 Kan. 567, 587-88, 713 P.2d 457 (1986); *State v. Dubish*, 236 Kan. 848, 852, 854, 696 P.2d 969 (1985).

In *McNaught*, the Kansas Supreme Court analyzed a combination sentence imposed under an earlier statute with similar language that permitted sentencing courts to impose incarceration, probation, or any appropriate combination of the authorized dispositions. 238 Kan. at 587-88 (evaluating K.S.A. 1984 Supp. 21-4603[2]). The court considered whether the district court could impose both incarceration and restitution when the sentencing scheme at the time only permitted restitution as part of granting probation. 238 Kan. at 587-89. The court ultimately determined that imposing incarceration with restitution was not an appropriate combination of the authorized dispositions because the statute only authorized the imposition of restitution *with* probation and, therefore, the district court sought to impose only part of the probation/restitution subsection. 238 Kan at 587-89. The court reasoned: "'The use of the word "appropriate" implies that the combination of penalties under the statute should be harmonious. *Thus the trial court may not impose imprisonment, which mandates incarceration, with either probation or suspension of sentence, because to do so would be to decree mutually exclusive penalties*.'" (Emphasis added.) 238 Kan. at 588-89 (quoting *State v. Chilcote*, 7 Kan. App. 2d 685, 689-90, 647 P.2d 1349 [1982]). As a note, although not relevant to the present issue, the current statutory scheme now permits district courts to impose both incarceration and restitution. See *State v. Alderson*, 299

Kan. 148, 150, 322 P.3d 364 (2014). Although the sentencing statute has been amended, *McNaught* remains instructive on interpreting the statutory language related to the imposition of a combination of sentences that include both incarceration and probation.

Additionally, the applicable statutory definition of probation demonstrates that McDaniel's request was not "appropriate." Probation is defined as

> "a procedure under which a defendant, convicted of a crime, is released by the court after imposition of sentence, *without imprisonment* except as provided in felony cases, subject to conditions imposed by the court and subject to the supervision of the probation service of the court or community corrections. *In felony cases, the court may include confinement in a county jail not to exceed 60 days, which need not be served consecutively, as a condition of an original probation sentence and up to 60 days in a county jail upon each revocation of the probation sentence* pursuant to subsection (b)(3) of K.S.A. 2022 Supp. 21-6702 . . . ." (Emphases added.) K.S.A. 2022 Supp. 21-6603(g).

First, this definition clearly demonstrates that a probation sentence is intended to be imposed instead of—not in addition to—imprisonment. Second, in cases when the defendant is convicted of a felony, a court may impose probation and a term of confinement, so long as the term of confinement occurs in a county jail and does not exceed 60 days. Clearly, McDaniel's request to be sentenced to five years of incarceration and multiple years of probation for the same conviction does not conform to the statutory definition of probation and is thus not an "appropriate" sentencing combination under the applicable statutory scheme.

Similarly, the Kansas Supreme Court long ago held that a district court may not "grant probation on one conviction and imprison the individual for other convictions arising out of the same incident." *Dubish*, 236 Kan. at 852 (interpreting K.S.A. 1984 Supp. 21-4603 which, like the statute at issue here, authorized district courts to sentence defendants to incarceration, probation, or any appropriate combination of the authorized

dispositions). The court further explained that "[a] sentencing judge has no jurisdiction to manipulate the eligibility date for release of a person sentenced to the custody of the Secretary of Corrections by granting probation on certain convictions and incarceration on others." *Dubish*, 236 Kan. at 855. A panel of this court found that *Dubish* was limited to circumstances involving sentencing in single cases, not multiple cases. *State v. Torkelson*, 29 Kan. App. 2d 672, 674, 30 P.3d 320 (2001). *Dubish* is relevant to McDaniel's argument here because he was sentenced below *not only in a single case*, but also *for a single count of conviction*. Sentencing McDaniel to both a term of incarceration and probation for a single conviction in a single case is not an "appropriate" combination of authorized dispositions under K.S.A. 2021 Supp. 21-6604(a)(13).

Moreover, as explained above, McDaniel requested more than just a sentence composed of both incarceration and probation—McDaniel also requested that a special condition be imposed, the satisfaction of which would control whether he was eventually permitted to transition from incarceration to probation. The plain and unambiguous language of the statute does not authorize the district court to construct such a conditional, combination sentence. Because both the statute's language and numerous court decisions interpreting similar statutory language support the district court's determination that it did not have the authority to impose McDaniel's requested sentence, this court affirms McDaniel's sentence.

II. THIS COURT DECLINES TO ADDRESS MCDANIEL'S UNPRESERVED CLAIM THAT KORA IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

For the first time on appeal, McDaniel challenges the constitutionality of KORA. He asserts that KORA is facially unconstitutional as violative of the First Amendment to the United States Constitution. Generally, issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). Additionally, constitutional grounds for reversal asserted for the first time on appeal are

generally not properly before this court for review. See *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021). However, the Kansas Supreme Court has recognized three exceptions to this general rule:

> "'(1) [T]he newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) the claim's consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground or reason for its decision.'" *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (quoting *State v. Harris*, 311 Kan. 371, 375, 461 P.3d 48 [2020]).

It is well accepted that appellants seeking review of unpreserved constitutional claims must assert the justification supporting the appellate court's review. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019); Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). McDaniel contends that this court should review his unpreserved First Amendment challenge to KORA because it satisfies the first two exceptions to the general rule. First, McDaniel argues that he is asserting a facial First Amendment challenge to KORA which would extinguish his duty to register pursuant to the Act and that no further factual development is necessary to consider the challenge. Second, McDaniel contends that his claim asserts the denial of a fundamental right—namely, the right to freedom of speech afforded by the First Amendment to the United States Constitution. This court need not determine if these exceptions apply because it declines to review McDaniel's claim. See *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

This court's decision to review an unpreserved constitutional claim for the first time on appeal—even if an exception applies permitting such review—is a prudential one. *Rhoiney*, 314 Kan. at 500. Although the appellate court is not obligated to explain its declination, the parties' briefing of the constitutionality of KORA's specific requirements does not support or attract this court's review of the potentially complex constitutional

issue. For example, McDaniel fails to identify the type of facial challenge asserted. See, e.g., *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2387, 210 L. Ed. 2d 716 (2021) (explaining the two general types of facial challenges under the First Amendment to the United States Constitution).

CONCLUSION

Although McDaniel is understandably disappointed that the district court did not agree to the downward durational departure that he and the State requested, the court did not err in its statutory interpretation. The district court lacked the authority to impose the contingent, combination sentence McDaniel requested, and his sentence is therefore affirmed. This court declines to review McDaniel's unpreserved claim that KORA violates the First Amendment to the United States Constitution.

Affirmed.