No. 124,591

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BENJAMIN E. BUZZINI,
Appellant.

SYLLABUS BY THE COURT

Any violation of K.S.A. 2020 Supp. 21-5405(a)(3), as it existed both before and after July 1, 2011, is excluded from the list of enumerated offenses that trigger automatic registration as a violent offender under the Kansas Offender Registration Act.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed April 21, 2023. Reversed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Kimberly A. Rodebaugh, senior assistant district attorney, *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

ARNOLD-BURGER, C.J.: Benjamin E. Buzzini entered a guilty plea to one count of involuntary manslaughter while driving under the influence of alcohol. The sole question on appeal is whether, based on the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., and the statements made by the district judge, Buzzini must register as a violent offender. We find based on his crime of conviction and the failure of the district

court to make the necessary findings to override the statutory exemption to registration, the order that he register as a violent offender must be reversed.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case, though tragic, have no bearing on the sole issue raised in this appeal. But in summary, in April 2017, Buzzini, while traveling 150 miles per hour and under the influence of alcohol and drugs, rolled his vehicle, killing his passenger.

Buzzini subsequently entered a guilty plea to involuntary manslaughter while under the influence of alcohol and any drug in violation of K.S.A. 2016 Supp. 21-5405(a)(3). In exchange, the State agreed to recommend a mitigated sentence for the severity level 4 felony offense, which was expected to result in a 38-month prison sentence based on Buzzini having a criminal history score of I.

At sentencing, the district court declined to grant Buzzini's requests for a dispositional or durational departure:

> "The Kansas Legislature has dictated this offense is a presumptive prison offense. That means I must follow that requirement unless I find substantial and compelling reasons to depart. I do not find substantial and compelling reasons here. There are four recognized purposes of the criminal justice system; incapacitation, rehabilitation, deterrence and punishment. The most significant factor here is purely punishment. This was an egregious incident that took a life. [The] Court has no hesitancy finding there was not substantial and compelling reason to depart. Deterrence is another factor in the Court's mind enters in. Hopefully the example the Court is setting if you choose to get behind the wheel of a dangerous instrument, you do not drive impaired. You do not drive recklessly, and the resulting loss of life is an example of what can happen if that occurs."

The district court further announced it was imposing a controlling prison sentence of 38 months.

The presentence investigation (PSI) form prepared and filed before Buzzini's sentencing showed "Offender Registration Required (K.S.A. 22-4902)." Likewise, the confidential portion of the PSI report showed that Buzzini would be subject to a 15-year registration period based on a conviction for "Involuntary Manslaughter - K.S.A 21-5405(a)(l), (a)(2) or (a)(4)."

Following the sentencing, the district judge filed a journal entry of judgment, which included a check in a box labeled "Yes" signifying that Buzzini committed the crime with a deadly weapon. Yet, under the "Miscellaneous Provisions" section, the court did not check the box signifying Buzzini was informed of a duty to register. And a review of the transcript from the sentencing hearing confirms that offender registration was not discussed. The supplement attached to the journal entry reflected only that Buzzini had to register as a "VIOLENT OFFENDER" for 15 years because of his conviction for "Involuntary Manslaughter – K.S.A. 21-5405(a)(1), (a)(2), or (a)(4)." Contrary to the first page of the sentencing journal entry, the box signifying that he must register because of a finding by the court "that such felony was committed with a DEADLY WEAPON" was not checked.

Buzzini now appeals.

ANALYSIS

Buzzini argues the district court's order requiring him to register under KORA is invalid because his crime of conviction does not require registration. We have jurisdiction over this appeal, even though it results from a guilty plea, because Buzzini is challenging the district court's order requiring him to register as a violent offender under

KORA. See *State v. Marinelli*, 307 Kan. 768, 788, 415 P.3d 405 (2018) (holding that defendants can appeal an order to register under KORA even if they pleaded guilty).

Deciding this case requires that we examine KORA to determine whether Buzzini is correct. The statute we will be examining is the 2020 version of KORA. As further explanation, although the crime occurred in April 2017, Buzzini was not sentenced until April 2021. Typically, a defendant is punished according to the law in effect at the time of their crime, but the Kansas Supreme Court has held that KORA is not considered punishment. See *State v. Stoll*, 312 Kan. 726, 730-31, 480 P.3d 158 (2021). Because the 2020 version of KORA was the version in effect at the time of sentencing, it is the version we must apply. *State v. Harkins*, No. 108,614, 2015 WL 5458665, at *1 (Kan. App. 2015) (unpublished opinion).

We examine the rules of statutory construction.

Again, resolving this appeal requires statutory interpretation, which presents a question of law subject to unlimited review. *Stoll*, 312 Kan. at 736.The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). 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. *State v. Ayers*, 309 Kan. 162, 164, 432 P.3d 663 (2019). Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

Buzzini does not meet the statutory definition of a "violent offender" based on his crime of conviction.

A "violent offender" required to register under KORA is:

> "(e) . . . [A]ny person who: (1) [o]n or after July 1, 1997, is convicted of . . . (E) involuntary manslaughter, as defined in . . . K.S.A. 2020 Supp. 21-5405(a)(1), (a)(2) or (a)(4), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2020 Supp. 21-5405(a)(3), and amendments thereto, which occurred on or after July 1, 2011, through July 1, 2013." K.S.A. 2020 Supp. 22-4902(e)(1)(E).

Buzzini pleaded guilty to K.S.A. 2016 Supp. 21-5405(a)(3). The parties focus their dispute on the meaning of the second half of K.S.A. 2020 Supp. 22-4902(e)(1)(E), which purports to exempt "violations of K.S.A. 2020 Supp. 21-5405(a)(3) . . . which occurred on or after July 1, 2011, through July 1, 2013," from registration. This crime occurred in April 2017, well outside the statutory window.

In Buzzini's view, this language is an attempt by the Legislature to clarify its intent—that individuals convicted of involuntary manslaughter-DUI should never have been subject to KORA registration. As support, he details the legislative history of the 2011 recodification of the involuntary manslaughter statutes and the later KORA revisions that incorporated those changes.

In contrast, the State contends that the second half of subsection (e)(1)(E) only exempts from registration the individuals convicted of involuntary manslaughter-DUI "on or after July 1, 2011, through July 1, 2013." K.S.A. 2020 Supp. 22-4902(e)(1)(E). Because Buzzini was convicted after July 1, 2013, Buzzini must register. As the State puts it, adopting Buzzini's interpretation "would make the time frame designated in the statute meaningless." See *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020)

(courts construe statutes to avoid unreasonable or absurd results and presumes Legislature does not intend to enact meaningless legislation).

We find that the statute is ambiguous. Does it mean that involuntary manslaughter-DUI was exempt from registration only if committed from 2011 to 2013 (meaning it is not exempt now) thus negating the first sentence of the statute or does it mean that involuntary manslaughter convictions after 2013 are also exempt from registration requirements—seemingly negating the need for any time-frame exemption?

Accepting Buzzini's invitation to review the legislative history, we find his argument to be persuasive.

Before recodification of the Kansas Criminal Code in 2011, Kansas law provided three ways to commit involuntary manslaughter, which is the unintentional killing of a human being committed:

> "(a) Recklessly;
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> "(b) in the commission of, or attempt to commit, or flight from any felony, other than an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto, that is enacted for protection of human life or safety or a misdemeanor that is enacted for the protection of human life or safety, including acts described in K.S.A. 8-1566 and subsection (a) of 8-1568, and amendments thereto, but excluding the acts described in K.S.A. 8-1567 and amendments thereto; or
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> "(c) during the commission of a lawful act in an unlawful manner." K.S A. 21-3404.

A separate statute covered the offense of involuntary manslaughter while driving under the influence of alcohol or drugs, defined as "the unintentional killing of a human being committed in the commission of, or attempt to commit, or flight from an act described in K.S.A. 8-1567." K.S.A. 21-3442. Although all three forms of involuntary

manslaughter convictions required registration, the offense of involuntary manslaughter-DUI was not listed as a crime requiring registration and never had been.

Effective July 1, 2011, the statutes were recodified/merged and involuntary manslaughter-DUI was brought under the mantle of the other three involuntary manslaughter crimes. So, effective July 1, 2011, by incorporation into the involuntary manslaughter statute it was, by definition, included as a crime that required registration. K.S.A. 2011 Supp. 22-4902(e)(l)(E). On July 1, 2013, the Legislature changed the statute to its current form, exempting violations of K.S.A. 2020 Supp. 21-5405(a)(3). If left unaddressed in the 2013 statute, there would have been an anomaly for the time after July 1, 2011, and before July 1, 2013, where registration was required for violating K.S.A. 2011 Supp. 21-5405(a)(3).

We agree with Buzzini that the only way to reconcile the insertion of that particular date range is to recognize that the Legislature was trying to clarify that it *never* intended violations of K.S.A. 2020 Supp. 21-5405(a)(3) to be included in the definition of violent offenses requiring registration. This interpretation is strengthened because K.S.A. 2020 Supp. 21-5405(a)(5)—a more severe form of involuntary manslaughter-DUI that requires the offender to have committed the offense while their driving privileges are already restricted because of a DUI is also omitted from the definition of violent offenses requiring registration. K.S.A. 2020 Supp. 22-4902(e)(1)(E). It would not make sense that the Legislature omitted a more serious offense from registration requirements, but required Buzzini to register for a crime that carried a lesser penalty.

In sum, because K.S.A. 2020 Supp. 21-5405(a)(3) is excluded from the list of enumerated offenses that trigger automatic registration as a violent offender under KORA, the district court erred in requiring Buzzini to register as a violent offender because of his conviction of involuntary manslaughter-DUI.

The district court did not make sufficient findings on the record that a deadly weapon was used in commission of Buzzini's crime to override the statutory exemption in K.S.A. 2020 Supp. 22-4902(e)(1)(E).

The State asserts in the alternative that Buzzini should still have to register as a violent offender because the district court exercised its discretion to make a "deadly weapon" finding. K.S.A. 2020 Supp. 22-4902(e)(2) (defining "'violent offender'" as "any person who . . . is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony"). As support, the State references the comments made by the district court judge at Buzzini's sentencing:

> "This was an egregious incident that took a life. [The] Court has no hesitancy finding there was not substantial and compelling reason to depart. Deterrence is another factor in the Court's mind enters in. Hopefully the example the Court is setting if you choose to get behind the wheel of a dangerous instrument, you do not drive impaired. You do not drive recklessly, and the resulting loss of life is an example of what can happen if that occurs."

In the State's view, the judge's statement that Buzzini used a "dangerous instrument" to cause Futrell's death equates to a finding that he used a "deadly weapon" to commit the crime. As support, the State references recent decisions in which the Kansas Supreme Court has upheld registration orders based on a district court's oral statements combined with findings made on a sentencing journal entry. See *State v. Carter*, 311 Kan. 206, 209, 459 P.3d 186 (2020); *Marinelli*, 307 Kan. at 784.

In *Carter*, a jury convicted the defendant of aggravated robbery after he robbed a Dollar General brandishing a Taser. At sentencing, after the State brought up a duty to register, the district court ordered defendant to register under KORA after making an oral finding that "'there was a *dangerous weapon involved*.'" 311 Kan. at 208. The sentencing journal entry reflected—with a checked box in the appropriate section—that Carter had to

register because the court determined the offense was committed with a deadly weapon under K.S.A. 2019 Supp. 22-4902(e)(2). Carter challenged the registration order on appeal. The Kansas Supreme Court determined that even though the court used different language—"'dangerous'" instead of "'deadly,'" the journal entry was enough to comply with the statute. 311 Kan. at 212.

In *Marinelli*, the defendant pleaded no contest to one charge of aggravated assault after head-butting and swiping at the victim with a knife. The acknowledgment of rights form showed he would not be subject to KORA registration. When the State brought up registration at sentencing, Marinelli objected since he was not informed about any registration requirement when the district court accepted his plea and because there was no necessary finding on the record. The court determined these to be procedural violations that could be remedied by seeking to withdraw his plea—which Marinelli declined to do—so the court directed that Marinelli would need to register under KORA. On the sentencing journal entry, the court checked boxes and completed forms signifying that Marinelli was subject to registration because he committed the offense with a deadly weapon. On appeal, the Kansas Supreme Court found the judge made the necessary findings based on the contents of the sentencing journal entry and because the record supported a deadly weapon finding. *Marinelli*, 307 Kan. at 788-89.

Another case the State cites is more instructive. See *State v. Thomas*, 307 Kan. 733, 415 P.3d 430 (2018). In *Thomas*, a jury convicted the defendant of aggravated battery with a deadly weapon after she hit another woman in the forehead with a stiletto heel. At sentencing, the district court informed Thomas of her duty to register but made no specific finding that she committed the offense with a deadly weapon. A panel of this court determined that the district court's failure to make the deadly weapon finding warranted vacating the registration order and remanding for additional findings. *State v. Thomas*, No. 109,951, 2014 WL 3020029, at *12 (Kan. App. 2014) (unpublished opinion). The Kansas Supreme Court agreed that the absence of a specific deadly weapon

finding meant the registration order was issued in error but disagreed with the panel's chosen remedy to remand the case. Instead, it vacated the registration order. 307 Kan. at 749-50.

As in *Thomas*, the district court's error here was that it failed to make a specific deadly weapon finding on the record. And to support our conclusion that the court was not considering the vehicle to be a deadly weapon, the record shows that the court failed to notify Buzzini of any duty to register. Although lack of notice alone does not automatically invalidate an order to register under KORA, we find it is a factor to consider when trying to discern the judge's intent from an otherwise ambiguous record. See *Marinelli*, 307 Kan. at 790 ("No provision in KORA creates a consequence for the failure to inform a defendant at the appropriate time."). Unlike in *Carter* and *Marinelli*, there was no discussion of registration requirements at any point during the sentencing. The full context of the district court's comment about a "dangerous instrument" shows that it was merely ruling on whether substantial and compelling reasons existed to depart from the presumptive sentence. In other words, nothing about the court's statements conveyed it was trying to make a deadly weapon finding that required Buzzini to register as a violent offender under K.S.A. 2020 Supp. 22-4902(e)(2).

In addition to the ambiguity of the court's oral statements, it is also not entirely clear from the sentencing journal entry that the court used a deadly weapon finding to order Buzzini to register under KORA. Admittedly, the court checked the box labeled "Yes" in answer to the question: "Did offender, as determined by the Court, commit the current crime with a deadly weapon?" Yet the offender registration supplement that the court was required to attach reflected only that Buzzini had to register for 15 years because of the involuntary manslaughter conviction. The judge did not check the box on the supplemental form signifying that Buzzini committed the offense with a deadly weapon. One could argue that the initial checkbox is enough to constitute the deadly weapon finding, but the fact that the court did not mark the same checkboxes on the

offender registration supplement and instead relied solely on Buzzini's crime of conviction, suggests otherwise. Put simply, if the court believed Buzzini committed his crime with a deadly weapon, the supplement would reflect those findings clearly by having the checkboxes for those findings filled in. It is just as likely that the judge erroneously checked the box on one form as it is that she erroneously failed to check the same box on a supplemental form. Without a clear statement from the bench specifically related to the registration requirement, we cannot find that the court made a discretionary finding that Buzzini used a deadly weapon requiring registration.

Because we find that based on defendant's crime of conviction and the failure of the district court to make the necessary findings to override the statutory exemption to registration, the order that he register as a violent offender must be reversed.

Reversed.