

NOT DESIGNATED FOR PUBLICATION

No. 124,778

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHRISTOPHER ANTONIO SHIVERS,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Opinion filed April 14, 2023.
Affirmed in part and dismissed in part.

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

Before MALONE, P.J., GREEN and CLINE, JJ.

PER CURIAM: Christopher Antonio Shivers pleaded guilty to one count of aggravated battery, a severity level 5 person felony, and one count of misdemeanor sexual battery. At sentencing, the district court granted the joint recommendation from the parties for a durational departure and sentenced Shivers to a 60-month controlling sentence. Shivers now appeals, arguing (1) the district court erred when it used his prior criminal history without requiring a jury to find that he had committed those prior crimes and (2) the district court abused its discretion by sentencing him to prison. We granted Shivers' motion for summary disposition of his appeal under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State has not responded. After reviewing the record, we affirm the district court and dismiss part of Shivers' appeal for lack of jurisdiction.

Shivers contends the district court erred during sentencing because it used his prior criminal history to calculate his criminal history score without requiring a jury to determine, beyond a reasonable doubt, that he committed those prior crimes in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This is a claim that can be raised for the first time on appeal. *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002). We have unlimited review over this question of law. *State v. Dickey*, 301 Kan. 1018, 1036, 350 P.3d 1054 (2015) ("Whether a defendant's constitutional rights as described under *Apprendi* were violated by a district court at sentencing raises a question of law subject to unlimited review.").

Our Supreme Court has rejected this argument. *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002). The *Ivory* court reasoned that the use of prior criminal history does not violate a defendant's constitutional rights because those prior crimes are a sentencing factor, not an element of the crime. In other words, *Apprendi* does not preclude sentencing courts from considering a defendant's prior convictions when determining their sentence. This court is duty-bound to follow Kansas Supreme Court precedent unless there is an indication that the court is departing from its previous position. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022). Shivers provides no argument to suggest that our Supreme Court is altering course. Thus, his argument fails. The district court did not err by using Shivers' prior criminal history to calculate his criminal history score.

Next, Shivers asserts that the district court abused its discretion by sentencing him to prison. Although an appellate court may review a departure sentence under K.S.A. 2022 Supp. 21-6820(a), this court lacks jurisdiction to address this issue because Shivers' sentence resulted from a plea agreement with the State. Whether jurisdiction exists is a question of law subject to unlimited review. *State v. Gleason*, 315 Kan. 222, 226, 505 P.3d 753 (2022). Under K.S.A. 2022 Supp. 21-6820(c)(2), an appellate court is precluded from reviewing "any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record." This includes a departure

sentence agreed to by the State and the defendant, such as Shivers received. *State v. Cooper*, 54 Kan. App. 2d 25, 28, 394 P.3d 1194 (2017).

The State and Shivers reached a plea agreement under which Shivers would plead guilty to amended charges of severity level 5 aggravated battery and misdemeanor sexual battery in exchange for the State joining in a recommendation for a departure sentence of 60 months. Consistent with the plea agreement, Shivers filed a motion for a durational departure down to 60 months. At sentencing, the district court stated that it would adopt the parties' plea agreement, which it noted was "very, very favorable," and it sentenced Shivers to 60 months' imprisonment. Shivers received the exact sentence he requested. Because the district court sentenced Shivers in conformity with the plea agreement, K.S.A. 2022 Supp. 21-6820(c)(2) controls. Thus, we lack jurisdiction to review Shivers' claim that the district court abused its discretion by sentencing him to prison.

Affirmed in part and dismissed in part.