NOT DESIGNATED FOR PUBLICATION

Nos. 124,816
124,817

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOHN D. BAKER,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III. Opinion filed April 7, 2023. Reversed, sentence vacated, and remanded with directions.

Kristen B. Patty, of Wichita, for appellant.

Thomas R. Stanton, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: John Baker appeals the district court's decision denying his motion to correct an illegal sentence. He argues that the court erred when it calculated his criminal history at sentencing by engaging in improper fact-finding when it classified an earlier juvenile adjudication—for burglary in 1990—as a person felony. We agree. We therefore reverse the district court's judgment, vacate Baker's current sentence, and remand the case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Baker was sentenced for two drug-related crimes in 2007. At sentencing, Baker objected to the State's calculation of his criminal-history score because he believed that a 1990 juvenile burglary adjudication should be scored as a nonperson felony. According to Baker, the State had not shown that he had burglarized a "dwelling"—a fact necessary to classify the burglary conviction as a person felony under the law at that time.

In response, the State presented the complaint and journal entry from the previous adjudication, showing Baker had burglarized a cabin. The State also presented a presentence-investigation report and journal entry from one of Baker's unrelated previous cases; Baker had not objected to the 1990 adjudication being scored as a person felony in that case. The district court agreed with the State and scored the 1990 adjudication as a person felony. The court then sentenced Baker to consecutive terms of 242 months and 34 months in prison.

This court affirmed his convictions and most aspects of his sentences—including the decision to score his 1990 burglary adjudication as a person felony—during Baker's direct appeal. *State v. Baker*, No. 99,353, 2010 WL 2216738 (Kan. App. 2010) (unpublished opinion), *rev. denied* 291 Kan. 913 (2011). But the panel remanded for resentencing on other grounds. 2010 WL 2216738, at *12-13. The district court resentenced Baker in 2011, imposing a controlling 217-month prison sentence.

In 2017, Baker filed a motion to correct an illegal sentence in one of the two consolidated cases before us, again arguing that the district court should have scored his 1990 burglary adjudication as a nonperson felony. The district court denied the motion, finding Baker had raised the issue in his direct appeal. Baker attempted to appeal this ruling but filed his notice of appeal too late to proceed.

In 2020, Baker filed another motion to correct an illegal sentence, this time in both consolidated cases—the motion that is the subject of this appeal. Once more, Baker argued that the district court should have scored his 1990 adjudication as a nonperson felony, citing the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), as well as the Kansas Supreme Court's decision in *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015). Broadly speaking, these cases instruct that—to comport with the jury-trial right enshrined in the Sixth Amendment to the United States Constitution—facts that increase the penalty for a crime must be proven to a jury beyond a reasonable doubt. See *Descamps*, 570 U.S. at 264-65; *Apprendi*, 530 U.S. at 490; *Dickey*, 301 Kan. at 1039. *Dickey* applied these principles to a 1992 burglary adjudication in Kansas.

The district court held a hearing and heard arguments from Baker, his attorney, and the State. The court then denied Baker's motion, finding that his sentences were legal when the sentencing court imposed them. Baker appeals.

DISCUSSION

K.S.A. 2022 Supp. 22-3504(a) allows a court to "correct an illegal sentence at any time" while a person is serving that sentence. A sentence is illegal when it "does not conform to the applicable statutory provision, either in character or punishment." K.S.A. 2022 Supp. 22-3504(c)(1).

The Kansas Supreme Court has interpreted this statute's reference to the "applicable statutory provision" to include "the statute defining the crime and assigning the category of punishment to be imposed." *State v. Edwards*, 281 Kan. 1334, 1337, 135 P.3d 1251 (2006); see also *State v. Alford*, 308 Kan. 1336, 1340, 429 P.3d 197 (2018) (noting "applicable statutory provision" includes the statute defining the crime,

assigning the category of punishment, and the criminal-history classification axis). This assessment includes whether a person's previous conviction was properly classified under the Kansas Sentencing Guidelines Act (KSGA) when determining criminal history—the issue Baker raises here. See *State v. Dickey*, 305 Kan. 217, 221-22, 380 P.3d 230 (2016).

The legality of a sentence is "fixed" at the time the sentence is pronounced by the court. See *State v. Clark*, 313 Kan. 556, Syl. ¶ 5, 486 P.3d 591 (2021). Practically speaking, this means that a sentence that was lawful at the time it was imposed cannot become illegal "because of a change in the law that occurs after the sentence is pronounced." K.S.A. 2022 Supp. 22-3504(c)(1). But later "developments" clarifying the law that controlled at sentencing may help illuminate "whether the sentence was illegal" at that time. *State v. McAlister*, 310 Kan. 86, Syl. ¶ 3, 444 P.3d 923 (2019).

Baker committed his offenses in this case in late 2005 and early 2006, so the law in effect then governs whether his sentence was illegal when it was imposed. See *State v. Adams*, 58 Kan. App. 2d 933, 939-40, 476 P.3d 796 (2020), *rev. denied* 312 Kan. 893 (2021). At that time, K.S.A. 2005 Supp. 21-4711(d)(1) required courts to categorize a juvenile burglary adjudication that was issued before the adoption of the KSGA in 1993 as a person felony if it was among the offenses classified as burglaries under K.S.A. 21-3715(a) (Furse 1995)—that is, if the person burglarized a "[b]uilding, manufactured home, mobile home, tent or other structure which is a dwelling."

Unlike K.S.A. 21-3715(a), the pre-KSGA statute in effect when Baker committed his 1990 burglary offense did not require a showing that the burglarized structure was a dwelling. See K.S.A. 1990 Supp. 21-3715. Thus, when Baker was sentenced for his current crimes in 2007, the district court had to look beyond the statute and make factual findings regarding the nature of his previous burglary adjudication. To resolve this question, the sentencing court reviewed documents—including the 1990 juvenile complaint and journal entry—which showed that Baker's adjudication was for burglary of

a cabin. The court then found that a cabin is a dwelling and thus scored the 1990 adjudication as a person felony.

This finding—that the burglarized cabin was a dwelling—was consistent with the definition of "dwelling" under Kansas law at the time. See K.S.A. 2005 Supp. 21-3110(7) (dwelling includes any building "or other enclosed space which is used or intended for use as a human habitation, home or residence"); see also *Herrick v. State*, 25 Kan. App. 2d 472, 478, 965 P.2d 844 (1998) ("[T]he building does not have to be presently used as human habitation, home, or residence for it to be considered a dwelling."), *abrogated by State v. Downing*, 311 Kan. 100, 456 P.3d 535 (2020). Indeed, as this court noted in Baker's direct appeal, a cabin "is by definition a structure meant for human habitation." *Baker*, 2010 WL 2216738, at *11 (citing Webster's New College Dictionary 157 [3d ed. 2005]).

Baker does not challenge the court's conclusion that a cabin is a dwelling, but rather asserts that the law did not permit the district court to look beyond the 1990 statutory definition of burglary and make that finding in the first place. In *Apprendi*, the United States Supreme Court held that "any fact"—"[o]ther than the fact of a prior conviction"—"that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Apprendi* was decided in 2000, years before Baker committed the crimes for which he was sentenced in 2007. Thus, the principles the United States Supreme Court announced in that case were part of the framework governing Baker's sentence.

The United States Supreme Court further clarified these principles in *Descamps*. *Descamps* recognized that sentencing courts may consider certain documents, like criminal complaints, when a defendant was convicted of violating a divisible statute—one that lays out multiple, alternative versions of a crime—so that the sentencing court can determine which version of the crime the defendant committed. 570 U.S. at 261-62.

But when the dispute at issue "does not concern any list of alternative elements," but "a simple discrepancy" between two versions of a crime, then this approach—looking at facts or documents outside the statutory elements of a crime—"has no role to play." 570 U.S. at 264. This means that if a later version of a criminal statute requires a finding that was not in the broader version of the statute under which the defendant was originally convicted, then a later sentencing court may not look outside the statute to see if the defendant met the element that did not then exist. See 570 U.S. at 264-65.

Courts have found that *Descamps* did not establish a new principle of law, but merely clarified the law that previously existed under *Apprendi*. See, e.g., *Dickey*, 301 Kan. at 1036 (noting that the concerns in *Descamps* "implicated" *Apprendi* and applying the holding in *Descamps* to a sentence rendered in 2002). These constraints thus define a framework applicable to all sentences rendered after *Apprendi* was decided in 2000.

The Kansas Supreme Court has applied this reasoning to the classification of pre-KSGA burglary convictions and juvenile adjudications—finding sentences to be illegal in circumstances nearly identical to Baker's case. See *State v. Donaldson*, 306 Kan. 514, 394 P.3d 1180 (2017) (involving classification of a 1990 burglary adjudication); *Dickey*, 301 Kan. 1018 (involving the classification of a 1992 burglary adjudication). These cases recognized that, under *Apprendi* and *Descamps*, a sentencing court may not look outside the statutory elements of a pre-KSGA burglary to determine whether it was of a "dwelling" because that was not an element in the pre-KSGA version of the offense. See *Dickey*, 301 Kan. at 1035-40. Any finding that a pre-KSGA burglary conviction was a person felony because it was of a dwelling "would have necessarily resulted from the district court making or adopting a factual finding," thus violating the legal principles that *Apprendi* and *Descamps* articulated. *Dickey*, 301 Kan. at 1039.

On appeal, Baker argues that this court should follow these decisions—especially *Donaldson*, which involved a later classification for criminal-history purposes of a 1990

burglary adjudication—and reach the same result here. In response, the State does not argue that the decisions in *Donaldson* and *Dickey* were incorrect or inappropriately applied the principles discussed by the United States Supreme Court in *Apprendi* and *Descamps*. Rather, the State points out that the Kansas Legislature recently revised the illegal-sentence statute to indicate that "opinion[s] by an appellate court of the state of Kansas" are changes in the law and thus do not affect the legality of a sentence. K.S.A. 2022 Supp. 22-3504(c)(2). Thus, the State argues, we may not rely on the decisions in *Dickey* and *Donaldson* to determine whether Baker's sentence was lawful.

At first blush, the State's argument has some common-sense appeal. *Dickey* and *Donaldson* are decisions by a Kansas appellate court, seemingly bringing them within the reach of K.S.A. 2022 Supp. 22-3504(c)(2). See *Adams*, 58 Kan. App. 2d 933, Syl. ¶ 9 (noting that the language of this statute is "unambiguous"). But the State's analysis overlooks an important point: *Dickey* and *Donaldson* did not establish any new principle of law—they merely applied the reasoning of the United States Supreme Court in *Apprendi* and *Descamps*. And the legislature did not describe opinions by the United States Supreme Court as changes in the law. K.S.A. 2022 Supp. 22-3504(c)(2). As we have indicated, the legal principles discussed in *Apprendi* and *Descamps* are binding on Kansas courts, both now and when Baker was sentenced in 2007.

So even if the Kansas Supreme Court's decisions in *Donaldson* and *Dickey* do not, in and of themselves, render Baker's sentences illegal, the reasoning in those cases—which is based on the principles set out in *Apprendi* and clarified in *Descamps*—is sound and persuasive. Under the legal framework in place when Baker committed his offenses in 2005 and 2006, a sentencing court determining a person's criminal history under K.S.A. 2005 Supp. 21-4711(d) could not look beyond the statutory elements of a pre-KSGA burglary to determine whether it involved a dwelling. That is what the sentencing court did here. Thus, the district court at Baker's 2007 sentencing should have scored his 1990 burglary adjudication as a nonperson felony.

Because the district court did not properly classify his previous burglary adjudication when determining his criminal history, the resulting sentence "does not conform to the applicable statutory provision." K.S.A. 2022 Supp. 22-3504(c)(1). Accord *Dickey*, 305 Kan. at 221 (finding that a nearly identical claim was a "challenge[] to the statutory propriety of the classification at issue—albeit with a thick overlay of constitutional law"). Baker's sentence is therefore illegal, and the district court erred when it reached a different conclusion.

We reverse the district court's denial of Baker's motion to correct an illegal sentence, vacate Baker's sentence, and remand with directions to impose a sentence classifying Baker's 1990 burglary adjudication as a nonperson felony.

Reversed, sentence vacated, and remanded with directions.