

NOT DESIGNATED FOR PUBLICATION

No. 125,482

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MAURICE A. BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed September 22, 2023. Sentence vacated and case remanded with directions.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Maurice A. Brown timely appeals from the sentence imposed at resentencing on remand, arguing the district court erred in concluding it had no authority to reconsider the downward dispositional/durational departure motion that was denied in his original sentencing and further failing to consider whether to impose a lesser sentence within the appropriate grid box for his base offense. After review, we find the district court erred by concluding it could not reconsider Brown's original departure motion at his resentencing and by concluding that it could not consider a lesser grid box sentence other than the aggravated sentence under the revised Kansas Sentencing Guidelines Act

(KSGA), K.S.A. 2022 Supp. 21-6801 et seq., for Brown's base offense. Thus, we vacate his base sentence and remand for resentencing.

FACTS

A jury convicted Brown of two counts of aggravated robbery and eight counts of kidnapping committed in January 2015. The district court sentenced him to 100 months' imprisonment on the base offense—aggravated robbery—applying criminal history category B. The district court further imposed consecutive sentences of 61 months' imprisonment for the other count of aggravated robbery and 61 months' imprisonment for each count of kidnapping for a total controlling sentence of 649 months' imprisonment. However, Brown's total sentence was capped at 200 months' imprisonment based on the double rule in K.S.A. 2014 Supp. 21-6819(b)(4): "The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence."

On direct appeal, another panel of our court upheld Brown's convictions but found the district court applied an incorrect criminal history score because a prior juvenile felony adjudication should have been scored as a nonperson offense. The panel vacated Brown's sentence and remanded for resentencing with the correct criminal history score, stating: "[W]e vacate Brown's sentence and remand this matter for resentencing after recalculating his criminal score in a manner consistent with this opinion." *State v. Brown*, No. 120,590, 2020 WL 1897361, at *7 (Kan. App. 2020) (unpublished opinion), *aff'd* 314 Kan. 292, 498 P.3d 167 (2021). On review, our Supreme Court upheld the panel's decision and instructed the district court to resentence Brown consistent with the panel's decision. 314 Kan. at 308.

At resentencing, Brown asked the district court to reconsider his motion for downward dispositional/durational departure sentence, which had been denied at his

original sentencing. Brown further asked the district court to consider modifying his other sentences to run concurrent. The district court found it had no authority to reconsider Brown's departure motion, nor could it modify any aspect of his original sentence other than applying criminal history category G to determine his sentence for the base offense. The district court sentenced Brown to 77 months' imprisonment for aggravated robbery, consecutive to his other sentences. It left his other sentences unmodified, imposing consecutive sentences of 61 months' imprisonment for the other count of aggravated robbery and 61 months' imprisonment for each of the 8 counts of kidnapping. However, Brown's total controlling sentence was capped at 154 months' imprisonment based on the double rule in K.S.A. 2022 Supp. 21-6819(b)(4). Additional facts are set forth as necessary.

ANALYSIS

Standards of Review

The issues on appeal involve interpretation of sentencing statutes and appellate court mandates, which are both questions of law subject to unlimited review. *State v. Moore*, 309 Kan. 825, 828, 441 P.3d 22 (2019). To the extent the parties also raise jurisdictional issues, they likewise present a question of law subject to unlimited review. *State v. Lundberg*, 310 Kan. 165, 170, 445 P.3d 1113 (2019).

The Scope of the Mandate

We begin our analysis by acknowledging the order remanding for resentencing was not as clear as it could have been. The previous panel vacated Brown's prison sentence without clarifying whether it was vacating all of his sentences or just his sentence for the base offense. 2020 WL 1897361, at *7. Our Supreme Court remanded for resentencing "consistent with the panel's decision that Brown's prior Michigan

juvenile adjudication for armed robbery was erroneously classified as a person felony." 314 Kan. at 308.

The analysis by the previous *Brown* panel reflects the only illegality in Brown's original sentence was the incorrect scoring of his prior Michigan juvenile adjudication for armed robbery. 2020 WL 1897361, at *5-7. This necessarily only affected his sentence for the base offense—aggravated robbery. See K.S.A. 2022 Supp. 21-6819(b)(3) ("The base sentence is set using the total criminal history score assigned."). All other sentences were determined without applying Brown's criminal history. See K.S.A. 2022 Supp. 21-6819(b)(5) ("Nonbase sentences shall not have criminal history scores applied."). The district court imposed sentences for all nonbase offenses within the range permitted in the appropriate KSGA grid box. See K.S.A. 2022 Supp. 21-6804(a) (55- to 61-month sentencing range for severity level 3 nondrug felonies with criminal history score I). The district court also acted within its discretion in ordering the sentences to run consecutive to one another. See K.S.A. 2022 Supp. 21-6819(b) ("The sentencing judge shall otherwise have discretion to impose concurrent or consecutive sentences in multiple conviction cases.").

Because we observe no illegality in any of Brown's nonbase sentences, there was no authority to vacate them. We construe the panel's decision as only vacating Brown's sentence on the base offense of aggravated robbery. Accordingly, the scope of the mandate was limited to resentencing Brown on this offense.

The District Court Should Have Considered Brown's Departure Motion

Brown argues the district court erred in concluding it had no authority to reconsider his motion for downward dispositional/duration departure sentence. The State argues this is an issue Brown cannot raise because his departure motion was denied at his original sentencing and he did not raise the issue on direct appeal. Brown correctly

responds the issue could not have been raised on direct appeal because we would not have had jurisdiction to consider the denial of his departure motion. See K.S.A. 2022 Supp. 21-6820(c)(1). However, we have jurisdiction to consider whether the district court erred in interpreting its statutory authority at resentencing. *State v. Morningstar*, 299 Kan. 1236, 1240, 329 P.3d 1093 (2014). This jurisdiction includes review of a district court's conclusion it does not have authority to consider a departure motion. *State v. Warren*, 297 Kan. 881, 885, 304 P.3d 1288 (2013).

Brown's reliance on *State v. McMillan*, No. 124,726, 2023 WL 176653 (Kan. App. 2023) (unpublished opinion), *rev. granted* April 20, 2023, is well-placed. *McMillan* concluded our Supreme Court's precedent and the plain language of the KSGA gives a district court authority to reconsider a departure motion on remand for resentencing. 2023 WL 176653, at *5. In *State v. Guder*, 293 Kan. 763, 766, 267 P.3d 751 (2012), our Supreme Court held a district court has limited jurisdiction on remand for resentencing to modify sentences "to correct arithmetic or clerical errors, *to consider or reconsider departures from presumptive sentences*, or to modify sentences by reinstating previously revoked probations." (Emphasis added.) Further, the plain language of K.S.A. 2022 Supp. 21-6819(b)(5) provides: "Upon resentencing, if the case remains a multiple conviction case the court shall follow all of the provisions of this section concerning the sentencing of multiple conviction cases." In other words, the KSGA makes no distinction in the sentencing procedures between original sentencing and resentencing in multiple conviction cases.

At resentencing, a district court must impose a sentence compliant with the KSGA. *State v. Jamerson*, 309 Kan. 211, 216, 433 P.3d 698 (2019). "In doing so, the court has to exercise its independent judgment—within the limitations imposed by the KSGA—to determine the appropriate sentence." 309 Kan. at 218. The *McMillan* panel concluded this authority includes reconsidering a departure motion on remand for resentencing because the district court must impose a sentence in the appropriate KSGA

grid box unless it finds substantial and compelling reasons to depart. 2023 WL 176653, at *5; see K.S.A. 2022 Supp. 21-6815(a). Here, the district court erred in finding it had no authority to reconsider the departure motion which had been denied at Brown's original sentencing. Accordingly, we remand for resentencing so the district court can consider the departure motion if renewed at resentencing. See *Warren*, 297 Kan. at 887.

The District Court May Consider Any Sentence Authorized by the Appropriate KSGA Grid Box

Brown further argues the district court erred in refusing to consider any sentence other than the aggravated sentence in the appropriate KSGA grid box for his base offense. He is correct. An order remanding for resentencing permits the district court to exercise whatever authority it has under the KSGA in imposing the new sentence. *Morningstar*, 299 Kan. at 1241. Again, this requires the district court "to exercise its independent judgment—within the limitations imposed by the KSGA—to determine the appropriate sentence." *Jamerson*, 309 Kan. at 218. This authority includes the discretion to order any term within the appropriate grid box. K.S.A. 2022 Supp. 21-6815(a); *State v. Johnson*, 286 Kan. 824, 851, 190 P.3d 207 (2008). Here, the district court sentenced Brown to the aggravated grid box number—77 months' imprisonment—for the base offense, and it appears the district court did not understand the statutory authority it had to sentence Brown anew for his base offense. The district court had the authority at Brown's resentencing hearing to consider any appropriate sentence within the applicable grid box for Brown's base offense. And, too, it has this authority on remand.

Concurrent or Consecutive Sentencing

At resentencing, Brown requested the court "run the counts concurrent." It is not clear whether he was asking the district court to run only his base sentence concurrent

with his consecutive nonbase sentences, or whether he was asking the district court to run all sentences concurrent with one another.

However, Brown was correct to the extent the district court could order his base sentence to run concurrent with his nonbase sentences. "When a term of imprisonment is vacated on appeal and remanded for resentencing, the district court's authority in setting the length of the new prison term includes determining on remand whether it will run consecutive to the defendant's other terms of imprisonment." *Morningstar*, 299 Kan. 1236, Syl. ¶ 5; see *Jamerson*, 309 Kan. at 218 ("The KSGA permits a district court imposing a term of imprisonment upon resentencing to determine anew whether the prison term[] runs consecutive to a defendant's other sentences."). An appellate mandate ordering resentencing does "not restrict the district court's statutory sentencing authority on remand. It [is] intended only to permit the district court to exercise whatever authority it might have under the KSGA." *Morningstar*, 299 Kan. at 1241.

Here, the district court had the authority to consider anew whether to run Brown's base sentence concurrent with or consecutive to his nonbase sentences. Brown was subject to 77 months' imprisonment for the base offense, consecutive to 549 months' imprisonment for the nonbase offenses. Even if the district court ran his base sentence concurrent with his nonbase sentences, Brown's total controlling sentence—prior to applying the double rule—would still exceed twice the base sentence. Accordingly, this is a distinction without a difference. The district court may have erred in overlooking its authority, but the limited impact on the length of Brown's sentence or the manner in which it is served would only occur if the district court, on remand, sentenced Brown to a different number in the appropriate grid box from the aggravated number and/or granted Brown's motion for departure.

The district court was correct it did not have authority to modify Brown's nonbase sentences to run concurrent with one another because none of those sentences were

vacated. See *Jamerson*, 309 Kan. at 218. As a practical matter, the order vacating Brown's sentence for the base offense affected his total sentence under the double rule. See K.S.A. 2022 Supp. 21-6819(b)(4). But this did not require the district court to modify any of the sentences for the nonbase offenses because the double rule "shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence." K.S.A. 2022 Supp. 21-6819(b)(4). Accordingly, the mandate for resentencing did not affect any of Brown's nonbase sentences; they were determined without applying his criminal history, and they did not need to be individually modified under the double rule. See K.S.A. 2022 Supp. 21-6819(b)(4) and (b)(5).

One final point neither party addresses on appeal is the district court may have technically erred in resentencing Brown on the nonbase offenses, as none of those sentences were vacated, although we acknowledge the directions on remand were not as clear as they could have been. See *Jamerson*, 309 Kan. at 218. Still, the district court did not modify any aspect of those sentences, and we need not be concerned with this issue any further as Brown's nonbase sentences remain as originally imposed at his first sentencing.

We vacate Brown's sentence for the base offense (Count 1—aggravated robbery) and remand for resentencing. At resentencing, the district court may consider a departure motion (if made), as well as any sentence within the appropriate KSGA grid box and whether to run that sentence concurrent with or consecutive to Brown's nonbase sentences. However, the district court cannot alter any aspect of the nonbase sentences, except to the extent a lesser base sentence would affect Brown's total controlling sentence under the double rule or granting a durational or dispositional departure would affect the time and manner in which his sentences are served. See K.S.A. 2022 Supp. 21-6819(b)(8) ("If the sentence for the primary crime is a nonprison sentence, a nonprison term will be imposed for each crime conviction, but the nonprison terms shall not be aggregated or

served consecutively even though the underlying prison sentences have been ordered to be served consecutively."); *Jamerson*, 309 Kan. at 218.

Sentence vacated and case remanded with directions for resentencing.

* * *

MALONE, J., concurring: I concur with the majority that we must vacate Maurice A. Brown's sentence and remand for resentencing. On remand, the district court must consider a departure motion if Brown files one. The district court may also impose any sentence within the appropriate grid box under the Kansas Sentencing Guidelines Act. I would not have addressed the concurrent/consecutive sentencing issue because Brown did not raise that issue in this appeal or advance any argument about it. An issue not briefed is waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).