

NOT DESIGNATED FOR PUBLICATION

No. 125,514

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALVARO ERNESTO PERTUZ III,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Laura Stratton, of Capital Appeals and Conflicts Office, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., MALONE and WARNER, JJ.

PER CURIAM: Alvaro Ernesto Pertuz III appeals the district court's order requiring him to register under the Kansas Offender Registration Act (KORA) for the commission of a person felony with a deadly weapon. Pertuz claims for the first time on appeal that he was denied due process and deprived of a protected liberty interest when the district court ordered him to register as a violent offender without providing adequate notice and an opportunity to be heard on his duty to register. For the reasons stated below, we decline to address Pertuz' unpreserved constitutional claim for the first time on appeal.

FACTS

On June 15, 2022, the State filed an amended complaint charging Pertuz with aggravated battery on a law enforcement officer, a severity level 4 person felony, alleging that Pertuz used a deadly weapon, a rock, to cause bodily harm to Syllis Bohannon, a uniformed officer on duty. Pertuz pleaded guilty to the amended charge. The factual basis for the plea established that on August 26, 2021, Bohannon, a uniformed officer on duty, was trying to arrest Pertuz when he threw a rock at Bohannon's head resulting in "a major gash across his forehead" Bohannon was treated at a hospital for his injuries. The district court did not make a deadly weapon finding at the plea hearing.

The journal entry of the plea hearing specified that Pertuz caused "intentional great bodily harm with deadly weapon; rock." The presentence investigation (PSI) report included a checked box indicating that Pertuz needed to register under KORA. A separate box was checked stating that Pertuz had received notice of his duty to register.

The district court held the sentencing hearing on August 10, 2022. At the start of the hearing, the district court instructed Pertuz' counsel to "go over the notice of duty to register with [Pertuz]." The district court acknowledged that Pertuz had signed a written notice and that it would be filed. That same day, a signed "Notice of Duty to Register" form was filed with the district court. After acknowledging that Pertuz had signed the notice, the court sentenced him to a 41-month prison term with 36 months' postrelease supervision. The district court also required Pertuz to register under KORA for 15 years.

The journal entry of judgment later filed in district court included a box checked "Yes" for whether the district court determined that the crime was committed with a deadly weapon. The offender registration supplement attached to the journal entry also included checked boxes indicating that Pertuz needed to register based on a court finding that he had committed a felony with a deadly weapon. Pertuz timely appealed.

Pertuz brings an unpreserved claim on appeal

Pertuz' sole claim on appeal is that the district court's KORA registration order deprived Pertuz of due process by requiring him to register as a violent offender without providing adequate notice and an opportunity to be heard. The State asks us not to address Pertuz' claim which he is bringing for the first time on appeal.

Generally, allegations of a constitutional violation may not be raised for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). A court may, but is not required, to consider unpreserved issues if they fall within a recognized exception:

"(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason." 301 Kan. at 1043.

Pertuz concedes that he did not preserve his claim because he did not raise it below. Even so, he argues that this court should review the claim because it is purely a question of law based on proved or admitted facts or because hearing the claim would serve the ends of justice and prevent the denial of a fundamental right.

Pertuz brings an as-applied challenge to the constitutionality of K.S.A. 2022 Supp. 22-4902(e)(2). An as-applied challenge "contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge necessarily requires 'findings of fact.'" *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019). The State correctly disputes Pertuz' assertion that his claim is purely a question of law based on proved or admitted facts. For instance, Pertuz' brief disputes whether the PSI report informed Pertuz of his duty to register. Also, the record does not reflect what advice Pertuz attorney may have given him about his duty to register. The nature and extent of

this evidence would be relevant to analyze Pertuz' due process claim. We disagree with Pertuz' argument that the newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case.

The State concedes that this court has heard KORA claims for the first time on appeal to serve the ends of justice or to prevent the denial of a fundamental right. See *State v. Carter*, 55 Kan. App. 2d 511, 520, 419 P.3d 55 (2018) (addressing a claim for the first time on appeal about a deadly weapon finding for KORA purposes because it was necessary to serve the ends of justice), *rev'd on other grounds by State v. Carter*, 311 Kan. 206, 459 P.3d 186 (2020); *State v. Ford*, No. 119,328, 2019 WL 3242420, at *4 (Kan. App. 2019) (unpublished opinion) (same). But just because we have applied this exception in the past on KORA claims does not mean that we must address every similar claim raised by a defendant for the first time on appeal. "A 'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citations omitted.]" *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

We observe that other panels of this court have rejected claims much like the claim Pertuz is making, finding under similar facts that the defendant's due process rights were not violated because the record in each case clearly established that the defendant received adequate notice of the duty to register under KORA and an opportunity to be heard. *State v. Unruh*, No. 122,472, 2021 WL 4808279, at *5 (Kan. App. 2021) (unpublished opinion); *State v. Ruwart*, No. 121,621, 2021 WL 1703646, at *3 (Kan. App. 2021) (unpublished opinion); *State v. Epp*, No. 121,872, 2020 WL 6930597, at *2-6 (Kan. App. 2020) (unpublished opinion); *Ford*, 2019 WL 3242420, at *2-4. We find no reason to address Pertuz' claim for the first time on appeal when similar claims have been repeatedly rejected by other panels of this court.

But even if we fully analyzed the merits of Pertuz' claim, we would adopt the reasoning of prior decisions of this court that have rejected similar claims. Here, Pertuz received notice of his duty to register under KORA (1) with the amended complaint that expressly charged Pertuz with using a deadly weapon, (2) at the plea hearing where a factual basis was given about the rock being used as a deadly weapon, which Pertuz agreed to, (3) with the PSI report confirming Pertuz needed to register, (4) at the sentencing hearing when the district court went over the notice to register form that Pertuz had signed, and (5) with the journal entry of judgment that checked the box for a deadly weapon finding and the offender registration supplement that conveyed that Pertuz needed to register. At no point did Pertuz object and ask for an opportunity to be heard on whether he needed to register. Pertuz' due process rights were not violated.

Affirmed.