NOT DESIGNATED FOR PUBLICATION

No. 125,589

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee*,

v.

DUSTIN JAMES MCMILLIN,
*Appellant*.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Submitted without oral argument. Opinion filed December 8, 2023. Appeal dismissed.

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

*Kirstyn D. Malloy*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Dustin James McMillin challenges the district court's order requiring him to register as a drug offender under the Kansas Offender Registration Act (KORA), K.S.A. 2022 Supp. 22-4901 et seq. He argues that KORA is facially unconstitutional under the First Amendment to the United States Constitution and section 11 of the Kansas Constitution Bill of Rights because it violates the compelled speech doctrine. We decline to consider McMillin's claim because he did not preserve it for appeal.

*Factual and Procedural Background*

In October 2020, after observing a traffic violation, a police officer in Bonner Springs stopped a vehicle that McMillin was driving. The officer learned that McMillin had a revoked driver's license, took him into custody, and then did an inventory search of the vehicle, discovering a bag containing about 28 grams of methamphetamine. McMillin agreed to plead guilty to one count of possession of methamphetamine with intent to distribute, a severity level 2 drug felony, in violation of K.S.A. 2020 Supp. 21-5705(a)(1).

The district court accepted McMillin's guilty plea at a hearing in December 2021, after advising him of his rights and confirming he understood the terms of the plea agreement. The district court also informed McMillin at the hearing that he would have to register for fifteen years due to the nature of his offense, which McMillin confirmed he understood. McMillin raised no objection then. By mutual agreement of the parties, the district court released McMillin on a personal recognizance bond to allow him the chance to take care of some personal matters before sentencing but required McMillin to complete the registration paperwork within three days of the plea hearing. McMillin apparently did so.

After a series of continuances at defense's request, the district court sentenced McMillin to 108 months in prison with a 36-month postrelease supervision term. The district court also reminded McMillin of his duty to register as a drug offender for 15 years, explaining that he would need to update his registration once released from prison. McMillin raised no objections to the registration requirement then.

McMillin timely appeals.

*Does KORA violate the compelled speech doctrine?*

McMillin argues KORA violates the First Amendment to the United States Constitution and section 11 of the Kansas Constitution Bill of Rights because registration compels offenders to speak the government's message that they are dangerous. He also contends the registration scheme under KORA cannot survive strict scrutiny because it lumps together all classes of offenders and requires no affirmative showing that an individual is "actually dangerous" before requiring registration. The State counters that McMillin's constitutional claim is not preserved for appeal and that this court should decline to reach it. This court should agree with the State and dismiss McMillin's appeal.

McMillin acknowledges that he did not object to the district court's registration order. Generally, constitutional issues not raised before the district court cannot be raised on appeal. *State v. Valdez*, 316 Kan. 1, 10, 512 P.3d 1125 (2022). Yet as he also notes, appellate courts recognize several exceptions to this general rule, two of which he asserts apply here. See *State v. Harris*, 311 Kan. 371, 375, 461 P.3d 48 (2020) (listing exceptions to general rule that new legal theory may not be raised for first time on appeal). First, McMillin contends he is raising a facial challenge to KORA which presents solely a legal question, and that no further factual development is necessary. See *State v. Boettger*, 310 Kan. 800, 803, 450 P.3d 805 (2019) ("Issues about the constitutionality of a statute present questions of law over which this court has unlimited review."). Second, McMillin argues this court should consider his claim because it involves fundamental rights protected by the First Amendment. See *State v. Jones*, 313 Kan. 917, 933, 492 P.3d 433 (2021) (recognizing freedom of speech as fundamental right).

Even so, the decision to review an unpreserved claim under any recognized exception is a prudential one so an appellate court has no duty to consider an unpreserved issue for the first time on appeal. *State v. Genson*, 316 Kan. 130, 135-36, 513 P.3d 1192 (2022), *cert. denied* 143 S. Ct. 1092 (2023); see also *State v. Gray*, 311 Kan. 164, 170,

459 P.3d 165 (2020) (declining to reach unpreserved claim and finding failure to present argument to district court "deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review").

Several panels of this court within the last year have declined to review the same constitutional claim for the first time on appeal, finding it would not be prudent to address the complex analysis associated with a constitutional issue that was not presented to the district court below. See *State v. Spilman*, 63 Kan. App. 2d. 550, 575, 534 P.3d 583 (2023) (collecting cases), *petition for rev. filed* August 7, 2023; *State v. Harpe*, No. 124,732, 2023 WL 5992237, at *8 (Kan. App. 2023) (unpublished opinion); *State v. Miller*, No. 125,213, 2023 WL 5811770, at *5 (Kan. App. 2023) (unpublished opinion). We find that approach best.

In a reply brief, McMillin contends that his facial challenge would not require additional factual development, arguing "there is no set of facts under which KORA, as currently constituted, passes constitutional muster." But as another recent panel held, reviewing a facial challenge to KORA like McMillin's would require consideration of several unresolved factual questions:

> "Identifying the compelling governmental interests KORA is meant to protect and then determining whether it is sufficiently narrowly tailored to serve those interests involves examining a host of issues best explored first at the district court level. Analyzing the proportionality of KORA requires an in-depth balancing of its benefits and costs, along with exploring potential alternatives to achieving those benefits and the accompanying costs and anticipated effectiveness of those alternatives. It may even involve evaluating KORA's effectiveness in protecting the compelling governmental interests it is meant to serve, which could involve the presentation of evidence and fact-finding. And '[f]act-finding is simply not the role of appellate courts.' *State v. Nelson*, 291 Kan. 475, 488, 243 P.3d 343 (2010) (citing *State v. Thomas*, 288 Kan. 157, 161, 199 P.3d 1265 [2009])." *State v. Pearson*, No. 125,033, 2023 WL 2194306, at *1 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March 20, 2023.

Likewise, in *Spilman*, the panel noted that the "strict scrutiny" analysis—which would apply because McMillin asserts that KORA improperly compels speech—would require the State to show a compelling government interest justifying the restrictions on a fundamental right in a way that is narrowly tailored to achieve that interest. 63 Kan. App. 2d at 576. The same is true here, and this examination would require further factual development beyond the appellate record.

McMillin offers one argument not addressed by prior panels for why this court should take up his unpreserved constitutional challenge, based on the United States Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023). That case involved a wedding website designer who moved for an injunction to prevent the state of Colorado from compelling her to create websites or provide design services inconsistent with her sincerely-held religious belief that marriage is reserved to unions between one man and one woman. The district court declined to grant an injunction and entered an order for summary judgment for the defendants, which the United States Court of Appeals for the Tenth Circuit affirmed. But the Supreme Court reversed, holding that the First Amendment prohibits compelling a person "to speak [the government's] message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." 600 U.S. at 586.

According to McMillin, *303 Creative* shows that it would be imprudent not to reach the merits of his constitutional challenge to KORA because the Supreme Court addressed the compelled speech challenge in the case "prospectively, *even before any person had been compelled to speak*." And he points out that the potential penalties he faces for not speaking as the State compels him to are "a much more serious threat to his liberty" because he faces "potentially decades of imprisonment" by not registering under KORA.

Still, neither of these points persuades us to address McMillin's unpreserved constitutional challenge to KORA.

First, *303 Creative* asked whether the petitioner lacked standing to bring a declaratory, pre-enforcement action to enjoin the State from compelling her speech, not from a dispute about whether the issue had been preserved for appeal. The issue of standing was present from the outset of the case and fully briefed by the parties. Here, in contrast, standing is not an issue and, in any event, the record suggests McMillin has already subjected himself to "compelled speech" by completing his registration paperwork. If anything, *303 Creative* serves as a compelling reason *not* to reach the merits of McMillin's KORA challenge since the parties in that case stipulated to several facts that were needed to address the constitutional arguments presented in the case. See *303 Creative*, 600 U.S. at 582 (listing and applying stipulations). Not so here.

Second, beyond referencing *303 Creative* in his reply brief as a reason to reach the merits of his First Amendment challenge, McMillin does nothing to explain how its holding may apply here. In *303 Creative*, Colorado tried to compel speech by Ms. Smith that she did not wish to provide, and it did so to "'excis[e] certain ideas or viewpoints from the public dialogue.'" 600 U.S. at 588. Here, the State of Kansas is providing information to protect the public from designated offenders whom the Legislature has concluded are likely to reoffend. *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1 (2000). Nothing suggests to us that *303 Creative* applies here. In short, we are not persuaded to reach the merits of McMillin's case.

For these reasons, we dismiss McMillin's appeal as unpreserved.

Appeal dismissed.