

NOT DESIGNATED FOR PUBLICATION

No. 125,716

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KELLY E. WHEELOCK,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Opinion filed August 4, 2023. Affirmed.

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

Before ARNOLD-BURGER, C.J., MALONE and SCHROEDER, JJ.

PER CURIAM: Kelly E. Wheelock timely appeals the consecutive sentences imposed by the district court after he pled guilty to felony burglary, misdemeanor theft, and misdemeanor criminal damage to property. We granted Wheelock's motion for summary disposition under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State responds we should dismiss for lack of jurisdiction. We disagree with the State and find we have jurisdiction to address Wheelock's appeal because the sentences imposed are not entirely presumptive sentences. See K.S.A. 2022 Supp. 21-6803(q). After reviewing the record, we find no error by the district court, and we affirm.

Wheelock was charged with three offenses committed in April 2021: (1) burglary, a nonperson felony; (2) theft, a class A nonperson misdemeanor; and (3) criminal damage to property, a class B nonperson misdemeanor. Wheelock entered into a plea agreement, and the State, in exchange for Wheelock's guilty pleas, agreed to recommend the sentences run concurrent. The State also agreed to recommend a dispositional departure to probation.

Wheelock pled guilty, and the district court released Wheelock on bond pending his sentencing hearing. Wheelock failed to meet the conditions of his bond. As a result, the State argued it was no longer bound to its plea agreement and recommended Wheelock's sentences run consecutive. The State still recommended a dispositional departure.

At the sentencing hearing in June 2022, the district court imposed the presumptive 29-month prison sentence for felony burglary, the maximum 12-month jail sentence for misdemeanor theft, and the maximum 6-month jail sentence for misdemeanor criminal damage to property. The district court ordered the sentences to run consecutive for a total term of 47 months and then granted Wheelock's motion for a dispositional departure to 24 months of supervised probation.

Wheelock now argues the district court abused its discretion when it ordered his sentences to run consecutive instead of concurrent. The State responds we lack jurisdiction to address the issue on appeal under K.S.A. 2022 Supp. 21-6820(d). The State acknowledges a departure sentence is generally subject to appeal, with limited exceptions. See K.S.A. 2022 Supp. 21-6820(a); *State v. Looney*, 299 Kan. 903, 908, 327 P.3d 425 (2014). However, Wheelock is not appealing his departure sentence to probation and does not claim the sentences imposed violate K.S.A. 2022 Supp. 21-6606(a).

When jurisdiction is a questioned, we have unlimited review. The same standard of review applies to the interpretation of statutes. *Looney*, 299 Kan. at 906. We review a district court's decision on whether to run sentences consecutive or concurrent for an abuse of discretion when the sentences imposed are not all on-grid crimes. *State v. Ross*, 295 Kan. 1126, 1138, 289 P.3d 76 (2012). Because Wheelock was also sentenced for two misdemeanors not defined as presumptive guideline sentences in addition to felony burglary, we have jurisdiction to review his claim on appeal. See 295 Kan. at 1137.

Here, Wheelock specifically limits his appeal to one issue: Did the district court abuse its discretion by making his sentences run consecutive rather than concurrent? Our answer is no.

Judicial discretion is abused only if the district court's decision is based on an error of law or fact or if it is arbitrary, fanciful, or unreasonable. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Wheelock bears the burden of showing such abuse of discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

When multiple sentences of imprisonment for different crimes are imposed on a defendant on the same day, these sentences can "run concurrently or consecutively as the [district] court directs." K.S.A. 2022 Supp. 21-6606(a). In *State v. Taylor*, No. 124,802, 2023 WL 3909808, at *2 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* July 7, 2023, a panel of this court reviewed Taylor's consecutive felony and misdemeanor sentences for an abuse of discretion. Similar to Wheelock, Taylor challenged the district court's decision to run her underlying presumptive sentences consecutive rather than concurrent. The panel found no abuse of discretion by the district court's decision to order Taylor's sentences to be served consecutively. 2023 WL 3909808, at *3.

Wheelock argues on appeal the district court abused its discretion because it recognized he struggled with substance abuse when it granted the departure, but it also

used his substance abuse as a reason to order the sentences to run consecutive. Here, the district court was well within its statutory authority to order the sentences imposed on Wheelock to be served consecutively as provided in K.S.A. 2022 Supp. 21-6606(a). The district court's decision was not based on an error of fact or law, nor was it arbitrary, fanciful, or unreasonable. We are unpersuaded that no reasonable person would have agreed with the district court's decision.

Affirmed.