NOT DESIGNATED FOR PUBLICATION

No. 126,378

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

AATHEN LANCE ROY FITZMAURICE,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; BRETT A. WATSON, judge. Submitted without oral argument. Opinion filed June 7, 2024. Affirmed.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Aathen Lance Roy Fitzmaurice pleaded guilty to aggravated indecent solicitation of a child pursuant to a plea agreement. After finding Fitzmaurice was over the age of 18, the district court imposed as part of his sentence lifetime postrelease supervision and ordered that he reimburse the State Board of Indigents' Defense Services (BIDS) for attorney fees in the amount of $1,080. On appeal, Fitzmaurice contends the district court's finding that he was over 18 violated rights guaranteed to him through *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the United States Supreme Court held that

"[o]ther than the fact of a prior conviction, any fact 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. Although Fitzmaurice waived his right to a jury trial on the issue of his guilt, he claims he did not waive this right as to the age finding that enhanced his postrelease sentence to lifetime supervision. He also asserts the district court erred by not inquiring deeper into his financial resources before it ordered him to pay the BIDS attorney fees.

Since Fitzmaurice admitted his age to the district court in his plea agreement, no extrajudicial fact-finding occurred in violation of *Apprendi*. We also find the court sufficiently inquired into his financial management, assets, liabilities, and capability to work before assessing fees. We therefore affirm his conviction and sentence, including the BIDS attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Fitzmaurice with sexual exploitation of a child by visual depiction of a child under 18 and aggravated indecent solicitation of a child. Fitzmaurice eventually agreed to plead guilty to aggravated indecent solicitation of a child, and the State agreed to dismiss the other count in this case, withdrew its motion to revoke probation in another case, and agreed not to file charges in yet another case. In his plea agreement, under a section titled "Identity of the Defendant," Fitzmaurice noted he was born in 1991. He confirmed his full name, age, highest level of education, residential address, and present employment was accurately written in the agreement when he signed his initials after the following statement: "I have read this section (or had it read to me), I understand it, and I agree with it."

At his plea hearing, the district court informed Fitzmaurice he would be subject to lifetime postrelease supervision because of the crime he pled guilty to. When asked if he

understood this, Fitzmaurice responded, "Yes, I do." Before making the plea, Fitzmaurice's attorney asked the court to explain lifetime postrelease supervision to Fitzmaurice "to make sure that he understands what he's getting into." The court then addressed the concept of lifetime postrelease supervision and consequences for violating its conditions. After this explanation, Fitzmaurice again confirmed his understanding of lifetime postrelease supervision and his desire to enter into the plea agreement. A short time later, the district court found Fitzmaurice guilty of aggravated indecent solicitation with a child. At the end of the hearing, Fitzmaurice signed a "Notice of Duty to Register" on which he wrote his birth year was 1991.

Before the sentencing hearing, a presentence investigation (PSI) report was created. It labeled Fitzmaurice's criminal history score as D and listed his age as 30. At sentencing, Fitzmaurice did not object to this criminal history score, nor did he assert any issues with the PSI report listing his age as 30.

Although he acknowledged the district court told him at the plea hearing that the crime he pled guilty to carried with it a potential sentence that included lifetime postrelease supervision, Fitzmaurice asked the court not to impose this penalty. He argued that since the district court did not make a finding he was 18 or older at the time of the plea, "then that provision would run afoul of *Apprendi*, and require the court to make judicial fact finding of not a conviction, and therefore that provision would be unconstitutional." The court was not persuaded, noting he was clearly over 18 years old, as shown by the fact he was "in adult court. That is, you're not a juvenile being sentenced for a sexually violent offense."

Besides asking the district court not to impose lifetime postrelease supervision, Fitzmaurice also asked the court to waive any costs, fines, or fees. The district court asked Fitzmaurice almost a dozen questions about his financial resources, including questions about his assets, liabilities, financial management, and capability to work a job.

As part of the court costs and fees, it imposed $1,080 in BIDS attorney fees. The district court stated:

> "[I]mposition of these costs and fees will not impose an undue hardship upon you, because you are relatively young, you are capable of working, you will be on lifetime post-release supervision, and paying those costs and fees during the course of your post-release supervision time is entirely reasonable."

Fitzmaurice now appeals.

REVIEW OF FITZMAURICE'S APPELLATE CHALLENGES

Did the district court err in imposing lifetime postrelease supervision?

Fitzmaurice argues the district court engaged in improper judicial fact-finding when it ordered him to serve a lifetime postrelease supervision term. He specifically contends the court erred in concluding he was over the age of 18 when he committed the crime he pleaded guilty to. He repeats the argument he made below that under *Apprendi*, a jury, not the district court, should have determined whether he was 18 years old when he committed his crime.

Whether a defendant's constitutional rights under *Apprendi* were violated by a sentencing court raises a question of law subject to unlimited review. *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017).

Under K.S.A. 22-3717(d)(1)(G)(i): "[P]ersons sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." But if a person commits such a crime when they are under the age of 18, K.S.A. 22-

3717(d)(1)(G)(ii) mandates "postrelease supervision for 60 months." Fitzmaurice argues the district court violated *Apprendi* in imposing lifetime postrelease supervision because "[a]ge must be proven to a jury beyond a reasonable doubt before the increased postrelease term of K.S.A. 22-3717(d)(1)(G)(i) may be imposed."

> *This court has consistently held that if a defendant admits their age under* Blakely*, which Fitzmaurice did here, then the imposition of lifetime postrelease supervision is constitutional.*

Following *Apprendi*, the United States Supreme Court clarified multiple times that facts admitted by a defendant can elevate a sentence without violating the right to a jury trial. In *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. The following year, the Court reaffirmed this holding in *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("Accordingly, we reaffirm our holding in *Apprendi*: Any fact [other than a prior conviction] which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

Fitzmaurice admitted to the district court at least twice that he was over the age of 18 years old when he committed his crime. First, in his plea agreement and second in his notice of duty to register, which both stated his birth year was 1991. He also did not assert any issues with his PSI report, which listed his age as 30. This court has consistently found such admissions fall under the *Blakely* exception to the *Apprendi* rule when the defendant admits a fact. *State v. Conkling*, 63 Kan. App. 2d 841, 843-45, 540 P.3d 414 (2023), *rev. denied* 318 Kan. __ (March 24, 2024); *State v. Walker*, No. 125,554, 2023 WL 7983816, at *3-4 (Kan. App. 2023) (unpublished opinion), *rev. denied* 318 Kan. __ (March 28, 2024); see also *State v. Entsminger*, No. 124,800, 2023 WL

2467058, at *7 (Kan. App.) (unpublished opinion) (collecting cases "reject[ing] the exact argument" Fitzmaurice is making), *rev. denied* 317 Kan. 847 (2023).

Fitzmaurice acknowledges *Blakely*'s exception to *Apprendi*, this court's consistent reliance on this exception, and the fact "he was over 18 at the time of the current crime of conviction." But he argues those cases were wrongly decided and asks us to follow the concurring in part and dissenting in part opinion written by Judge Atcheson in *State v. Schmeal*, No. 121,221, 2020 WL 3885631, at *11-19 (Kan. App. 2020) (unpublished opinion). Fitzmaurice points out that Judge Atcheson would have found Schmeal's admission to his age in his plea agreement only overrode *Apprendi* if Schmeal expressly waived his right to have a jury determine whether Schmeal was 18 years old when he committed his crime. He asserts an *Apprendi* waiver "is consistent with the widely recognized principle that any waiver of a constitutional right must be knowing and voluntary."

But just as this panel is not bound to follow unpublished opinions of this court, it is also not bound to follow dissenting opinions. *State v. Akins*, No. 112,068, 2017 WL 2304449, at *1 (Kan. App. 2017) (unpublished opinion) ("Obviously, the dissenting opinion has no precedential effect on this court."). As another panel of our court noted in *Walker*, the United States Supreme Court confirmed in *Booker* and *Blakely* that under *Apprendi* the judge may impose the maximum sentence solely based on the facts reflected in the jury verdict *or facts admitted by the defendant*. *Walker*, 2023 WL 7983816, at *5. As in *Walker*, no *Apprendi* waiver was needed because Fitzmaurice "admitted to his age so no extrajudicial fact-finding was necessary." *Walker*, 2023 WL 7983816, at *5; see also *Schmeal*, 2020 WL 3885631, at *9 (Since Schmeal admitted his age, his *Apprendi* rights were not violated *and* there is no need to have the "State obtain a waiver from him voluntarily relinquishing his right to jury trial on the issue of age for purposes of imposing lifetime postrelease supervision.").

No one forced Fitzmaurice to admit his age, nor was he surprised by the sentence he received based on his admission of this fact. Therefore we see none of the injustice which the *Apprendi* rule was designed to stop—situations

> "in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. [Citation omitted.]" *Blakely*, 542 U.S. at 311-12.

Unlike the situation in *Blakely*, Fitzmaurice was not surprised by his sentence, and he admitted all the facts on which his sentence relied. Before he entered his plea, the district court twice informed Fitzmaurice that he would be subject to lifetime postrelease supervision if he was convicted of the crime he intended to (and did) plead guilty to. It also thoroughly explained the parameters of that portion of his likely sentence. He signed two documents in which he admitted to his age before sentencing and he had a chance to dispute the contents of his PSI report (which listed his age) at his sentencing.

Fitzmaurice analogizes the issue here to Jessica's Law cases. In Jessica's Law cases, a prison sentence of life occurs when: (1) There is a conviction for an enumerated, sexually violent crime; and (2) the accused is 18 or older. K.S.A. 21-6627(a)(1). In *State v. Bello*, 289 Kan. 191, 199-200, 211 P.3d 139 (2009), the Kansas Supreme Court held that *Apprendi* required vacation of life sentences imposed under Jessica's Law when neither the complaint nor jury instructions included a determination of the defendant's age. Similarly, Fitzmaurice argues that the portion of his sentence imposing lifetime postrelease supervision should be vacated since no evidence of his age was presented to a jury.

But Fitzmaurice's reliance on *Bello* is misplaced. In *Bello*, there was no factual admission to Bello's age, like we have here. Thus, the court found it improper for the district court to make a factual determination (without evidentiary support) on what it described as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 289 Kan. at 199. Here, the district court did not reach beyond Fitzmaurice's conviction or factual admission when sentencing him. And even the *Bello* court recognized *Blakely*'s *Apprendi* exception that facts admitted by a defendant can serve as the basis for elevating a sentence. *Bello*, 289 Kan. at 199.

Even if Fitzmaurice could show an *Apprendi* violation, he would still not be entitled to relief because the error is harmless. In *Schmeal*, this court recognized that while an *Apprendi* violation implicates harmless error review, such a violation does not automatically require reversal as a structural error. *Schmeal*, 2020 WL 3885631, at *10-11 (citing *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 [2006]; *Reyna*, 290 Kan. at 681-82). The panel then concluded that unless the record contained evidence that could lead to a contrary finding on the defendant's age, the error could be held harmless. *Schmeal*, 2020 WL 3885631, at *11; see *State v. Nunez*, No. 125,141, 2023 WL 6172190, at *16 (Kan. App. 2023) (unpublished opinion); *Walker*, 2023 WL 7983816, at *5. Here, the record does not contain such evidence. Rather, the record includes two admissions by Fitzmaurice that he was at least 18 years old at the time he committed the offense. Therefore even if we found the district court engaged in an *Apprendi* error, such an error was harmless.

Did the district court err in ordering Fitzmaurice pay $1,080 in BIDS attorney fees?

Fitzmaurice also argues the district court erred in ordering him to pay BIDS attorney fees totaling $1,080. He asks this court to vacate the district court's order and remand for further proceedings. This contention asks us to determine whether the district

court abided by K.S.A. 22-4513(b) and thus presents a question of law, giving us unlimited review. *State v. Ayers*, 309 Kan. 162, 163, 432 P.3d 663 (2019).

K.S.A. 22-4513(a) mandates a convicted defendant must reimburse all expenditures made by BIDS. Under K.S.A. 22-4513(b), a district "court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose." On appeal, Fitzmaurice asserts "the district court failed to account for the burden placed on Fitzmaurice to pay $1,080 in BIDS attorney fees."

In *State v. Robinson*, 281 Kan. 538, 546, 132 P.3d 934 (2006), the Kansas Supreme Court interpreted K.S.A. 22-4513, finding the sentencing court "must consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly*, stating on the record how those factors have been weighed in the court's decision." Both Fitzmaurice and the State agree the district court must follow K.S.A. 22-4513's statutory mandate to consider a defendant's financial resources.

Fitzmaurice and the State, however, disagree on the district court's compliance with the statute. Fitzmaurice argues the court "inquired very little into [his] financial resources," did not ask how much money he had saved, failed to consider his burden, did not factor his "difficulty obtaining employment after release" since he has to register as a sex offender, disregarded his inability to have a high paying job while incarcerated, and it did not inquire what his "'method of payment'" would be.

Although Fitzmaurice does not cite to the record to support these statements, the State references the transcript in detail to show the district court sufficiently inquired into Fitzmaurice's financial resources. For example, the court asked him whether he was employed prior to his arrest; what he did for employment; his age and physical capability of working; what his assets were, including any property such as a home and/or a car;

what type of car he owned; whether he had a bank account currently or previously; how he handled his finances when he got paid; what his financial liabilities were, including credit card debt, student loan debt, child support, etc.; whether he had people who could support him financially after he is released from custody; and whether there was anything else about his financial circumstances he wished the court to consider.

In deciding to impose $1,080 in BIDS attorney fees, the district court stated it found "that imposition of these costs and fees will not impose an undue hardship upon you, because you are relatively young, you are capable of working, you will be on lifetime post-release supervision, and paying those costs and fees during the course of your post-release supervision time is entirely reasonable."

We find the district court sufficiently complied with K.S.A. 22-4513. In total, the district court asked Fitzmaurice almost a dozen questions about his financial resources and burdens he bore. And it asked questions about Fitzmaurice's ability to work a job and his financial management, the two concerns he raises on appeal.

Further, *Robinson*'s interpretation of K.S.A. 22-4513 mandates the district court "*explicitly*[] stat[e] on the record how those factors have been weighed in the court's decision." 281 Kan. at 546. The district court complied with K.S.A. 22-4513 because it explicitly stated on the record the factors it weighed in reaching its decision—Fitzmaurice's age and ability to work. Lastly, the district court did consider Fitzmaurice's method of payment because it informed him that he would pay "these costs and fees during the course of [his] post-release supervision time." See K.S.A. 22-4513. And, according to the court, that was "entirely reasonable."

Because the district court carefully inquired into Fitzmaurice's financial resources and burdens, as well as explicitly stated on the record the factors it weighed in reaching

this ruling, we see no error in its decision to require Fitzmaurice to pay $1,080 in BIDS attorney fees.

Fitzmaurice has failed to show the district court erred in imposing his sentence, and so we affirm it.

Affirmed.