

NOT DESIGNATED FOR PUBLICATION

No. 96,013

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW R. LIMON,
Appellant.

MEMORANDUM OPINION

Appeal from Miami District Court; RICHARD M. SMITH, judge. Opinion filed April 6, 2007. Sentence vacated and case remanded with directions.

Janine Cox and Nathan B. Webb, of Kansas Appellate Defender Office, for appellant.

David L. Miller, county attorney, *Phill Kline*, former attorney general, and *Paul J. Morrison*, attorney general, for appellee.

Before GREENE, P.J., MALONE and HILL, JJ.

Per Curiam.: Matthew R. Limon appeals that aspect of his sentence extending his term of postrelease supervision from 12 months to 36 months, arguing the extension was based upon a finding of fact by the court that his crime was sexually motivated, which is prohibited by *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) and its progeny. The State contends that Limon's crime of conviction was sexually motivated by legal definition and required no finding that would contravene *Apprendi*.

Thus, this appeal squarely frames the question whether the crime of unlawful voluntary sexual relations-sodomy, in contravention of K.S.A. 2006 Supp. 21-3522(a)(2), is a sexually motivated crime by legal definition. Constrained by our legislature's categorization of this and related offenses, as well as the legislature's narrow definition of the term "sexually motivated" for these purposes, we are compelled to conclude that the crime is not sexually motivated by definition and that the finding of sexual motivation necessary for the upward departure on postrelease supervision was required to be made by a jury beyond a reasonable doubt. The district court's finding was violative of *Apprendi* and must be vacated and remanded with directions to resentence Limon to postrelease supervision of 12 months.

Factual and Procedural Overview

After a bench trial on stipulated facts, 18-year-old Limon was convicted of criminal sodomy on M.A.R., a male 15 years of age on the date of the offense, pursuant to K.S.A. 21-3505(a)(2). The stipulation established that Limon had consensual oral contact with the genitalia of M.A.R. Limon appealed his sentence challenging the constitutionality of the statute that criminalized his homosexual behavior more severely than the statute that criminalized similar heterosexual behavior. Limon argued that had his victim been female rather than male, he would have had the benefit of K.S.A. 2006 Supp. 21-3522 (enacted L. 1999, 169, sec. 38), unlawful voluntary sexual relations. Because 21-3522 was specifically limited in application to heterosexual couples, he was charged with criminal sodomy.

The Court of Appeals affirmed his conviction, and the Kansas Supreme Court denied his petition for review. *State v. Limon*, No. 85,898, unpublished opinion filed February 1, 2002, *rev. denied* 274 Kan. 1116 (2002). Limon appealed to the United States Supreme Court, which vacated his conviction and remanded the case to the Court of Appeals for a decision consistent with the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003). *Limon v. Kansas*, 539 U.S. 955, 156 L. Ed. 2d 652, 123 S. Ct. 2638 (2003).

On remand, a divided panel of the Court of Appeals affirmed Limon's conviction holding that the State had a rational basis for criminalizing teenage homosexual behavior more severely than teenage heterosexual behavior. *State v. Limon*, 32 Kan. App. 2d 369, 385, 83 P.3d 229 (2004), *rev'd* 280 Kan. 275, 122 P.3d 22 (2005). Limon appealed to the Kansas Supreme Court, which reversed the Court of Appeals, holding that the unlawful voluntary sexual relations statute was unconstitutional as written and striking the language "and are members of the opposite sex" from the applicable version of 21-3522. *State v. Limon*, 280 Kan. 275, 301-302, 306-07, 122 P.3d 22 (2005). The court ordered Limon's sentence vacated and remanded the case to the district court with directions "to: (1) charge Limon under the provisions of K.S.A. 2004 Supp. 21-3522 without the words 'members of the opposite sex' or (2) take other action within 30 days." 280 Kan. at 307.

In November 2005, and within the 30 days required, the State charged Limon with unlawful voluntary sexual relations; see K.S.A. 2006 Supp. 21-3522. Limon eventually pled guilty in January 2006:

"To the charge that on, or about, the 16th day of February, 200[0], that within Miami County, Kansas; you unlawfully, willfully, and intentionally did commit sodomy with a child. That being M-A-R; date of birth, 3/17/85, who is 14 or more years of age, but less than 16 years of age. And, while you were less than 19 years of age; and that the defendant, that

being you, was less than four years of age older than the child. And, the defendant and the child were the only parties involved in the unlawful sexual act; a violation of K.S.A. 21-3522, the crime of unlawful, voluntary sexual relations."

The parties agreed on the sentencing recommendation but disagreed on the length of postrelease supervision. Limon challenged the State's request of 60 months' extended postrelease supervision, arguing that the presumptive or "mandatory" period of postrelease was 12 months, that any extension of the period of postrelease supervision required a finding that the crime was sexually motivated, and that such a finding by the sentencing court would violate his constitutional right to a jury. The State countered by comparing Limon's case to prior Kansas appellate cases where the Kansas Supreme Court upheld extended postrelease supervision periods because the defendant had pled "guilty to a sex crime, basically." Additionally, the State argued that the court could find beyond a reasonable doubt that the crime was sexually motivated without violating United States Supreme Court and Kansas Supreme Court precedents.

After hearing these arguments, the district court held that unlawful voluntary sexual relations was a sexually motivated crime by legal definition and, therefore, the court could depart from the mandated 12 months' postrelease supervision and order a longer period up to 60 months. The court ordered Limon to serve 36 months' postrelease

supervision. Limon timely appeals the postrelease supervision departure.

Due to the United States Supreme Court opinion in *Cunningham v. California*, ___ U.S. ___, 166 L. Ed. 2d 856, 127 S. Ct. 856 (Case No. 05-6551, filed January 22, 2007), this court ordered the parties to provide supplemental briefs, regarding the application of *Cunningham* to this case.

Standard of Review

Limon challenges the district court's interpretation of K.S.A. 2000 Supp. 22-3717(d)(1)(D)(i) (in effect at time of 2000 crime; amended L. 2006, ch. 219, sec. 19) and K.S.A. 2006 Supp. 21-3522. Interpretation of a sentencing statute is a question of law and our standard of review is unlimited. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). When interpreting a statute, we recognize well-known rules of statutory interpretation.

"The fundamental rule of statutory construction is to ascertain the legislature's intent. The legislature is presumed to have expressed its intent through the language of the statutory scheme. Ordinary words are given their ordinary meanings. A statute should not be read to add language that is not found in it or to exclude language that is found in it. When a statute

is plain and unambiguous, the court must give effect to the legislature's intent as expressed rather than determining what the law should or should not be. [Citation omitted.]" *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

"The general rule is that a criminal statute must be strictly construed in favor of the accused, which simply means that words are given their ordinary meaning. Any reasonable doubt about the meaning is decided in favor of anyone subjected to the criminal statute. This rule of strict construction, however, is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent.' [Citation omitted.]" *State v. McCurry*, 279 Kan. 118, 121, 105 P.3d 1247 (2005).

Overview of Relevant Statutes

Limon pled guilty to "unlawful voluntary sexual relations," which is defined pursuant to K.S.A. 2006 Supp. 21-3522:

"(a) Unlawful voluntary sexual relations is engaging in voluntary: . . .
(2) sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved

....

"[b](2) Unlawful voluntary sexual relations as provided in subsection (a)(2) is a severity level 9, person felony."

Limon's postrelease supervision was controlled by K.S.A. 2005 Supp. 22-3717, which provides in relevant part:

"(d)(1) Persons sentenced for crimes, other than off-grid crimes, committed on or after July 1, 1993, will not be eligible for parole, but will be released to a *mandatory period of postrelease supervision* upon completion of the prison portion of their sentence as follows:

....

"(C) Except as provided in subparagraph (D) and (E), persons sentenced for nondrug severity level 7 through 10 crimes . . . *must serve 12 months*, plus the amount of good time earned and retained pursuant to K.S.A. 21-4722, and amendments thereto, on postrelease supervision.

"(D)(i) The sentencing judge *shall impose* the postrelease supervision provided in subparagraph . . . (d)(1)(C), *unless the judge finds* substantial and compelling reasons to impose a departure *based upon a finding* that the current crime of conviction was sexually violent or sexually motivated. In that event, departure may be imposed to extend the postrelease supervision to a period of up to 60 months.

....

"[d](2) As used in this section, 'sexually violent crime' means:

.... [(A) - (K) list specific crimes and do *not* include unlawful voluntary sexual relations--K.S.A. 21-3522.]

....

"(L) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated. *As used in this subparagraph, 'sexually motivated' means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.*" (Emphasis added.)

Overview of the Parties' Respective Arguments and the District Court's Ruling

Limon argues the district court erred when it held that "unlawful voluntary sexual relations" was defined as a "sexually motivated" crime. Limon claims *Apprendi* and its progeny reinforces his argument that the district court improperly found an additional fact to support its substantial and compelling reason for departure. Limon argues that the district court erred in construing and applying Kansas statutes and case law bearing on these issues.

The State presents two principal counter arguments. First, the State argues that the court had the authority to impose an extended postrelease supervision period because Limon pled guilty to intentionally committing a crime that by its statutory nature was sexually motivated. Alternatively, the State argues that the court had the authority because Limon *essentially* pled guilty to criminal sodomy, which is specifically defined as a sexually violent crime. Additionally, the State cites *State v. Walker*, 275 Kan. 46, 60 P.3d 937 (2003), to support its claim that a district court may determine whether a crime is sexually motivated as a question of law without violating *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), or *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001).

Instead of starting with the plain language of the statute, the district court determined that "unlawful voluntary sexual relations" was a sexually motivated crime based on its analysis of *Walker*, *State v. Purcell*, 30 Kan. App. 2d 1102, Syl. ¶ 1, 54 P.3d 523 (2002), *rev. denied* 275 Kan. 967 (2003), and *State v. Allen*, 30 Kan. App. 2d 774, Syl. ¶ 2, 48 P.3d 678 (2002), *rev. denied* 275 Kan. 965 (2003). The district court stated that *Walker* and *Allen* stood for the proposition that if the "crime of conviction itself could support the necessary finding, without violating *Gould* and *Apprendi*; [then] the nature of the offense itself can prove that fact beyond a reasonable doubt."

After providing its analysis and before pronouncing sentence, the district court agreed with Limon that unlawful voluntary sexual relations was not expressly classified in the statute as a sexually violent crime. It concluded, however, that "unlawful [voluntary] sexual relations, based upon an act of sodomy, is a sexually motivated offense by definition."

***Did the District Court Err in Concluding
that Limon's Conviction was Sexually Motivated
as a Matter of Legal Definition?***

Apprendi and Its Progeny

Pursuant to United States Supreme Court precedent, the Sixth and Fourteenth Amendments to the United States Constitution require a jury to determine, beyond a reasonable doubt, any fact that exposes a defendant to a greater potential sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 490.

"[T]he '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*. [Citations omitted.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation omitted], and the judge exceeds . . . proper authority." *Blakely v. Washington*, 542

U.S. 296, 303-04, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

This is a bright line rule that the Court recently reinforced in *Cunningham*, 166 L. E. 2d at 64-69. In *Cunningham*, the United States Supreme Court struck down California's determinate sentencing law (DSL) because the law gave "to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." 166 L. Ed at 860. Additionally, the Court noted that the facts supporting the departure were neither inherent in the jury's verdict nor supported by the defendant's plea and were only required to be proven by a preponderance of the evidence. 166 L. Ed 2d at 860. The statute required that a judge sentence a defendant to one of three terms: "a person convicted of continuous sexual abuse of a child 'shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.' [Citation omitted.]," but required the judge to impose the middle term unless the judge found defined mitigating or aggravating factors. 166 L. Ed 2d at 861-62. The Court reiterated that when a statute mandates punishment, the facts permitting departure must be proven to a jury beyond a reasonable doubt. The only time a jury determination is not required is if the facts necessary for the departure are inherent in the jury verdict or plea. 166 L. Ed 2d at 868-70.

Analysis of the Statutory Scheme for Postrelease Enhancement in Kansas

We begin our analysis by examining the plain language of the statute at issue. Here the sentencing judge was required to impose the mandatory postrelease period unless "the judge *finds*" reasons to depart "based upon a *finding*" that the crime of conviction was sexually violent or sexually motivated. (Emphasis added.) K.S.A. 2000 Supp. 22-3717(d)(1)(D)(I). The legislature's choice of terms is significant; it appears contemplated that the court should make a "finding" rather than a make a conclusion of law based upon some purely legal definition or classification. Clearly, the legislature could have simply imported or referenced some mechanism for making a pure legal determination, but it chose to require the court to make a "finding."

We agree with the district court that K.S.A. 2000 Supp. 22-3717(d)(2) expressly lists the crimes that are per se sexually violent and does not include the crime of which Limon was convicted, K.S.A. 2006 Supp. 21-3522 -- unlawful voluntary sexual relations. Notably, this is precisely why *Walker* does not control; the crime of conviction in *Walker* was one of those included in the list of sexually violent crimes. Where the crime of conviction is not among those expressly listed as sexually violent by the legislature in the applicable statute, our Supreme Court has recently held that the sentencing court's enhancement of sentence based upon a determination of sexual motivation was a "fact

that increases the penalty for a crime beyond the prescribed statutory maximum [that] must be submitted to a jury and proved beyond a reasonable doubt" based on *Apprendi*. *State v. Allen*, 283 Kan. ___, ___ P.3d ___ (No. 93,940, filed March 16, 2007), slip op at 5.

As noted by the court in *Allen*, a crime may also be classified as sexually violent if it was sexually motivated. "Sexually motivated" is defined as a crime committed "for the purpose of the defendant's sexual gratification." K.S.A. 2000 Supp. 22-3717(d)(2)(L). This definition of "sexually motivated" is curious in that it differs significantly from other statutory definitions of the same phrase. For example, in K.S.A. 21-3517, the required intent is "to arouse or satisfy the sexual desires of the offender or another." See also K.S.A. 2006 Supp. 21-3504(a)(2)(A). In contrast, the motivation required for a departure under K.S.A. 2000 Supp. 22-3717(d)(2)(L) is limited to one's *own* sexual gratification, but not that of another. We note that unlawful voluntary sexual relations—sodomy may conceivably be committed without any personal sexual gratification, but solely for the gratification of another. If the legislature intended to consider as sexually motivated a crime committed for the sexual gratification of another, it could have easily included that parameter in the definition provided by the statute.

This court's treatment of "sexually motivated" under the Kansas Offender Registration Act (KORA), K.S.A. 2006 Supp. 22-4901 *et. seq.*, buttresses our statutory analysis of K.S.A. 2000 Supp. 22-3717. K.S.A. 2006 Supp. 22-4902(c) provides a list of sexually violent crimes and also contains a definition of "sexually motivated" for purposes of the KORA and is identical to the definition at issue here. See K.S.A. 2006 Supp. 22-4902(c)(14). We have held that determining whether a crime is "sexually motivated" under KORA is a question of fact. *State v. Patterson*, 25 Kan. App. 2d 245, 247, 963 P.2d 436, *rev. denied* 265 Kan. 888 (1998). We see no basis to distinguish the analysis of the *Patterson* court; presumably, if the determination of whether a crime was sexually motivated is a factual question under KORA, it is also a factual question under the postrelease supervision statute; See *State v. Colter*, No. 91,034, unpublished Court of Appeals opinion filed September 3, 2004, slip op. at 8-9.

We conclude that based upon the legislature's requirement of a *finding*, the recent holding of our Supreme Court in *Allen*, the legislature's more restrictive definition of the term "sexually motivated", and the rationale and holding of *Patterson*, the statutory scheme for determining sexual motivation contemplates a factual determination in each case. Obviously, this conclusion implicates the constitutional prohibitions of *Apprendi* and its progeny.

Application of our Statutory Analysis to the Facts Herein

Turning to the record before us, we note that sexual motivation for Limon's crime was apparently not clear. In the district court's journal entry of sentencing, the court marked "no" in the box when asked: "Was the crime sexually motivated pursuant to KS Offender Registration Act K.S.A. 22-4902(c)(14)?" How can the crime be sexually motivated as a matter of law for purposes of upward departure for postrelease period but *not* sexually motivated for purposes for KORA? This inconsistency alone convinces us that the finding of sexual motivation for purposes of sentencing was more than a straightforward legal determination.

To avoid *Apprendi*, the State invites us to uphold the district court's increase in Limon's punishment based on Limon's admission of acts that could have been charged as criminal sodomy. The State suggests that because the facts would support a conviction of criminal sodomy, which is defined as a sexually violent crime, the judge was not required to find any additional facts. We reject this argument. The statute requires by its plain language that it is the "the crime of conviction" that must be determined sexually violent or sexually motivated; Limon was not convicted of criminal sodomy, but rather unlawful voluntary sexual relations.

We recognize that Limon was originally convicted of criminal sodomy. *Limon*, 280 Kan. at 277. This conviction was reversed, however, because the unlawful voluntary sexual relations statute required the State to charge homosexual sodomy as criminal sodomy while heterosexual sodomy was punished less severely under unlawful voluntary sexual relations. Therefore, the statute as applied violated Limon's equal protection rights. 280 Kan. at 306-07. In arguing that Limon's crime was identical to or inclusive of criminal sodomy, the State disregards not only the clear statutory language focusing on the crime of conviction, but it disregards the reversal of Limon's prior conviction. The State may not attempt to achieve indirectly what it was prohibited from doing directly.

We hold that the district court's finding that Limon's crime of conviction was sexually motivated was a factual determination prohibited by *Apprendi* and its progeny. The determination of sexual motivation was not discernable as a matter of law, given our analysis of the relevant statutes and applicable case law, our view of the facts of this case, and our rejection of the State's attempt to justify Limon's postrelease departure based upon a conviction that has been reversed. We vacate Limon's sentence, and we remand with directions to sentence him to the mandatory period of postrelease supervision pursuant to the statute.

Sentence vacated and case remanded with directions.