No. 19-120555-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

REBECCA ANN STEWART
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Bourbon County, Kansas
Honorable Mark A. Ward, Judge
District Court Case No. 18CR30

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STATEMENT OF THE CASE

Ms. Stewart pled guilty to one count of possession of methamphetamine, a severity level five drug felony. (R.5, 10). The district court sentenced Ms. Stewart to serve a 23 month prison sentence, despite the parties' joint recommendation for probation. (R.8, 6, 10). Ms. Stewart appeals her sentence.

STATEMENT OF THE ISSUE

Issue I: The district court abused its discretion in sentencing Ms. Stewart.

STATEMENT OF THE FACTS

Pursuant to a plea agreement, Ms. Stewart pled guilty to one count of possession of methamphetamine, a severity level five drug felony. (R.5, 10). The parties entered the plea agreement expecting Ms. Stewart's criminal history score to be "C," but later agreed the correct score was "D" because some juvenile convictions had decayed. (R.8, 4). Based on Ms. Stewart's criminal history score and the severity level of the crime, the presumptive sentence fell in a "border box," meaning the district court could order either prison time or probation. (R.8, 4). Additionally, a special rule applied because the crime occurred while Ms. Stewart was serving probation in another case. (R.8, 4).

At sentencing, the State waived the applicability of the special rule. (R.8, 5). The parties jointly recommended probation with an underlying prison sentence of 24 months. (R.8, 5-6). Defense counsel explained an error in the PSI, clarifying Ms. Stewart's pending criminal cases were in Labette County rather than Neosho County. (R.8, 5-7). The parties stipulated that drug treatment programs were available and that Ms. Stewart would be amenable to treatment. (R.8, 5-6, 10).

Nevertheless, the district judge imposed prison sentence of 23 months. (R.8, 9).

The judge explained the reasons for his sentence:

> **There has been no evidence presented** that an appropriate treatment program exists which is likely to be more effective than the presumptive prison term and reducing the risk of offender recidivism and that program is available, **nor any evidence** that the non-prison sanction would serve community safety interests by promoting offender reformation. In fact, just the opposite. I'm looking at extensive criminal history, in addition to pending criminal cases in Labette, Neosho, and perhaps even Oklahoma.

(R.8, 9) (emphasis added). Defense counsel protested, explaining he thought the stipulation would be sufficient evidence for the court to grant probation. (R.8, 10-11). Defense counsel asked for a continuance. (R.8, 10-11). The judge denied the continuance and further explained his decision:

> **It just does not appear to me that this is a case for probation for the Court to ignore the law**. A border box, in fact, is supposed to be a prison sentence. But on top of that, you've got the special rule that also applies that says I'm going to send you to prison. I just don't see any reasons for the Court to use any discretion **not to follow the law on this case**…"

(R.8, 11-12) (emphasis added).

Ms. Stewart filed a timely notice of appeal. (R.1, 81).

ARGUMENTS AND AUTHORITIES

Issue I: The district court abused its discretion in sentencing Ms. Stewart.

Introduction

The district judge abused his discretion when he found drug treatment programs did not exist and were not available despite the parties' stipulation otherwise.

Preservation

Ms. Stewart's counsel preserved this issue for appeal at sentencing, indicating he would file a motion to reconsider and asking to continue the balance of the hearing to allow an opportunity to present evidence regarding the treatment program. (R.8, 10). He explained he had not anticipated that he might need to present evidence regarding the program because of the State's stipulation. (R.8, 11). The judge did not grant a continuance, but said "you can file any motion you want. In fact, I would recommend perhaps that you file the notice of appeal." (R.8, 11). While counsel did not file a motion to reconsider, he did file a timely notice of appeal. (R.1, 81).

Jurisdiction

Generally, appellate courts lack jurisdiction to review a felony conviction sentence that either lies within the presumptive sentence range or results from a plea agreement. *E.g. State v. Edie*, 2016 WL 6568557, *1, 383 P.3d 719 (Kan.App. 2016) (*rev. denied* July 31, 2017) (unpublished), citing K.S.A. 2015 Supp. 21-6820(c) and *State v. Sprung*, 294 Kan. 300, 317, 277 P.3d 1100 (2012). Usually when a sentencing judge declines to make border-box findings and imposes a presumptive prison sentence, appellate courts lack jurisdiction. *State v. Edie*, 2016 WL 6568557 at *1. However, when a defendant argues that the sentencing judge refused to consider a request for a discretionary, non-presumptive sentence which the court had authority to consider, appellate courts may address whether the district court judge appropriately interpreted the sentencing statute. *State v. Warren*, 297 Kan. 881, 885, 304 P.3d 1288 (2013).

The *Warren* exception applies to this case. The district judge refused to consider a request for a discretionary non-presumptive probation sentence because the district judge refused to consider the stipulation of the parties as evidence. The judge misinterpreted the statute to require prison time. His comments show that he understood a probation sentence would only result from a choice by "the Court to ignore the law." (R.8, 10). His other comments further illustrate a misinterpretation of the statute: "I just don't see any reasons for the Court to use any discretion not to follow the law on this case." (R.8, 11).

But a judge does not "ignore the law" or refuse "to follow the law" when he grants probation rather than prison after making the statutory findings in a border box case. Instead, the statute authorizes the judge to grant probation after making specific factual findings that the parties stipulated to in this case. K.S.A. 21-6804(q).

This "optional nonprison sentence" is a discretionary non-presumptive sentence within the *Warren* exception. Prison time is the presumptive sentence for a border box case because a non-prison sentence requires certain findings. *See* K.S.A. 21-6804(q). The statutory language "the court may impose" authorizes the court to impose an optional nonprison sentence using its discretion.

This case is within the *Warren* exception granting appellate courts jurisdiction to review a judge's misinterpretation of a sentencing statute. Under *Warren,* this Court can reach the merits of Ms. Stewart's argument in this case.

Standard of Review

Whether or not appellate courts have jurisdiction is a question of law subject to de novo review. *State v. Key*, 298 Kan. 315, 318, 312 P.3d 355 (2013). Appellate courts

apply an abuse of discretion standard to review sentences. *See State v. Mosher*, 299 Kan. 1, 2, 319 P.3d 1253 (2014). An abuse of discretion occurs when an action is "(1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *State v. Huckey*, 51 Kan. App. 2d 451, 454, 348 P.3d 997 (2015) (citing *Fischer v. State*, 296 Kan. 808, Syl. ¶ 8, 295 P.3d 560 [2013]).

Analysis

The district judge abused his discretion when he imposed a prison sentence rather than probation. The judge's choice to impose a prison sentence was unreasonable and based errors of both law and fact.

A. The judge chose to impose a prison sentence based on an error of law.

The judge misinterpreted the statute to require prison time because he described a probation sentence as a result from a choice by "the Court to ignore the law." (R.8, 10). He also declined to make findings necessary to grant probation saying, "I just don't see any reasons for the Court to use any discretion not to follow the law on this case." (R.8, 11).

But a judge does not "ignore the law" or refuse "to follow the law" when he grants probation rather than prison after making the statutory findings in a border box case. K.S.A. 21-6804(q) specifically authorizes the judge to grant probation after making the factual findings that the parties stipulated to in this case. Instead of understanding a probation sentence as a legal sentence after making certain findings, the judge treated a probation sentence as a departure or a result contrary to law. The statutory language

belies that understanding. K.S.A. 21-6804(f), (q). The judge made an error of law when he misunderstood the sentencing statute to require prison time.

B. The judge chose to impose a prison sentence based on an error of fact.

The judge chose to impose a prison sentence because "there has been no evidence presented" to make the statutory findings needed to grant probation (R.8, 9). But the parties' stipulation that drug treatment programs were available and that Ms. Stewart would be amendable to treatment was the only relevant evidence before the district judge.

Parties are bound by their stipulations. *E.g. State v. Downey*, 27 Kan. App. 2d 350, 359, 2 P.3d 191, *rev. denied* 269 Kan. 936 (2000). As such, the State would not have been permitted to present evidence contrary to the stipulation. Further, a stipulation relieves the parties of the need to present further evidence. *See State v. Couse*, 281 P.3d 597, 2012 WL 3135490 (2012), *rev. denied* July 19, 2013 (unpublished).[1] If the district judge required more evidence than the parties' statements and the stipulation, he abused his discretion by refusing the grant the continuance. A continuance would have allowed the parties an opportunity to produce that evidence. The parties did not present evidence because they anticipated the stipulation would be sufficient.

While Ms. Stewart made statements regarding drug treatment programs, her statements did not contradict the stipulation. (R.8, 7). In fact, Ms. Stewart stated "I will plan to do the START program and attend meetings and try to get help." (R.8, 7). She also explained she had not already completed the program "because while in RDU in

[1] A copy of this opinion is attached as Appendix A.

prison they came and got me here for this case, so I didn't even get to finish RDU yet." (R.8, 7). The stipulation by the parties was not contradicted by any evidence.

While the judge described Ms. Stewart's criminal history and the special rule as reasons to impose a prison sentence, the state waived applicability of the special rule and the legislature contemplated Ms. Stewart's criminal history when it made the sentencing grid. Further, the judge should not have relied on pending charges against Ms. Stewart when he issued his sentence. Ms. Stewart had not yet been found guilty in any of those cases, and she should not be punished in this case merely for being charged in another.

The judge's statement that no evidence presented supported the necessary statutory findings to grant probation was an error of fact. This factual error tainted his decision to impose a prison sentence.

C. The judge chose to impose a prison sentence unreasonably.

The district judge's decision to impose a prison sentence was unreasonable because it was based on both factual and legal errors. The joint stipulation by the parties provided a proper basis to grant probation. The judge's comments illustrate his misunderstanding of the sentencing statute and misunderstanding of the relevant facts. Choosing to impose a prison sentence when the only evidence available supports making statutory findings to grant a nonprison sentence instead, and when the State agrees to a nonprison sentence is an unreasonable decision.

CONCLUSION

The district court judge abused his discretion by imposing a prison term. This Court should vacate Ms. Stewart's sentence and remand for resentencing.

Respectfully submitted,

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Appendix A

281 P.3d 597 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.) Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Jeremy A. COUSE, Appellant.

No. 102,889.
|
July 27, 2012.
|
Review Denied July 19, 2013.

Appeal from Rooks District Court; Thomas L. Toepfer, Judge.

Attorneys and Law Firms

Michael S, Holland, II, of Holland and Holland, of Russell, for appellant.

Edward C. Hageman, county attorney, and Steve Six, attorney general, for appellee.

Before MALONE, P.J., BUSER and STANDRIDGE, JJ.

MEMORANDUM OPINION

BUSER, J.

***1** Jeremy A. Couse was convicted of driving under the influence of alcohol (DUI), transporting an open container, driving in violation of license restrictions, and having a defective tail lamp. On appeal, Couse raises a constitutional challenge to K.S.A.2010 Supp. 8–1012, the statute controlling the preliminary breath test (PBT). Because it is unnecessary to address the constitutional issue, we affirm on other grounds.

FACTUAL AND PROCEDURAL BACKGROUND

At the outset, the trial court held a suppression hearing, but inexplicably, a transcript of the hearing was unavailable for appeal. As a result, the trial court prepared a statement of the evidence pursuant to Supreme Court Rule 3.04 (2010 Kan. Ct. R. Annot. 26). Many of the facts stated below are taken from this statement of the evidence.

Couse was stopped in the early morning hours of June 1, 2008, by Officer James Phlieger for a defective taillight. The traffic stop evolved into a DUI investigation when the officer noted that Couse smelled of alcohol, had bloodshot eyes, and had an open can of beer in his vehicle. However, Couse passed field sobriety tests.

Officer Phlieger next asked Couse to take the PBT. At this point, according to the trial court's findings, Couse was being "detained" and was "not free to leave." The trial court made no specific findings regarding whether Couse consented to the PBT, only that he "took the PBT."

The PBT "showed a B.A.C. of .096," and Couse was arrested for DUI. Couse then took a breath test on the Intoxilyzer 8000, which returned a reading of "0.094 grams of alcohol per 210 liters of breath." Couse moved to suppress this evidentiary breath test based on the circumstances surrounding the PBT.

In the trial court, Couse contended "[a]bsent the illegally and improperly obtained [PBT] results the officer lacked probable cause to arrest ... for [DUI]." Couse claimed he did not voluntarily consent to the PBT and that the implied consent provision of the PBT statute, K.S.A.2010 Supp. 8–1012(a), was unconstitutional. Thus, Couse argued "any and all evidence seized subsequent to the initial illegal arrest ... must be suppressed."

The trial court agreed with Couse that "absent the [PBT] results, the officer lacked probable cause to arrest ... for [DUI], because of the lack of signs of physical impairment." The trial court disagreed with Couse on the constitutional issue, however, holding that K.S.A.2010 Supp. 8–1012(a) validly supplied implied consent to the PBT. After the denial of his motion to suppress, Couse waived jury trial and, together with the State, submitted a stipulation of evidence for trial to the bench.

Couse stipulated "[a]fter reading the implied consent advisory, [he] voluntarily consented to take the PBT." Couse also stipulated he "voluntarily submitted" to the evidentiary breath test. The trial court found Couse guilty "based upon the parties' jointly filed Stipulation of Fact and Waiver of Jury Trial." Couse appeals.

DISCUSSION

***2** For his sole issue on appeal, Couse contends "the [PBT] statute is unconstitutional as it 'implies consent' to an otherwise unconstitutional search under the Fourth Amendment to the United States Constitution." The State counters that implied consent is not at issue in this case given the stipulation of the parties. "After being advised of his rights, Couse voluntarily consented to take the PBT. It's that simple."

A question regarding the constitutionality of a statute is a question of law for which an appellate court's scope of review is unlimited. *In re Tax Appeal of CIG Field Services Co.*, 279 Kan. 857, Syl. ¶ 3, 112 P.3d 138 (2005). Similarly, when a case is submitted solely on stipulated facts, an appellate court has unlimited review of the question of whether to suppress evidence. *State v. Jones*, 279 Kan. 71, Syl. ¶ 1, 106 P.3d 1 (2005).

In *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, Syl. ¶ 3, 256 P.3d 845 (2011), our Supreme Court observed: "Appellate courts generally avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge to a statute." In *Allen*, our Supreme Court declined to address the constitutionality of the PBT in a driver's license suspension case because other evidence established reasonable grounds for the evidentiary test. 292 Kan. at 660. Our Supreme Court took the same approach in *Smith v. Kansas Dept of Revenue*, 291 Kan. 510, 519, 242 P.3d 1179 (2010). We will follow the guidance set forth in *Allen* and *Smith*.

The PBT is a search. *Jones*, 279 Kan. 71, Syl. ¶ 2. Absent an exception to the Fourth Amendment's warrant requirement, it is presumptively unreasonable. *Jones*, 279 Kan. at 76; *State v. Daniel*, 291 Kan. 490, 496, 242 P.3d 1186 (2010), *cert. denied* — – U.S. —— (2011); *State v. Thompson*, 284 Kan. 763, 776, 166 P.3d 1015 (2007). Since it is uncontroverted that the PBT here was not supported by probable cause, the issue is whether Couse consented to the test. See *State v. Davis*, 41 Kan.App.2d 1034, 1038–39, 207 P.3d 281 (2009). The voluntariness of consent is a question of fact. *State v. Parker*, 282 Kan. 584, Syl. ¶ 5, 147 P.3d 115 (2006).

A driver may voluntarily consent to the PBT. *City of Kingman v. Lubbers*, 31 Kan.App.2d 426, 429, 65 P.3d 1075, *rev. denied* 276 Kan. 967 (2003). "For a consent to search to be valid, two conditions must be met: (1) There must be clear and positive testimony that consent was unequivocal, specific, and freely given and (2) the consent must have been given without duress or coercion, express or implied." *Thompson*, 284 Kan. at 776.

Couse stipulated in writing to voluntary consent in the district court. He relies on the written stipulation in his statement of facts on appeal. The State agrees with Couse's statement of facts and, in fact, joined in the stipulation. As a result, the State contends Couse voluntarily consented to the PBT. Of note, Couse did not respond to the State's argument. Indeed, he did not file a reply brief to challenge the State's understanding of the plain words of the stipulation or seek a release from his written stipulation.

***3** Couse did challenge the voluntariness of his consent at the suppression stage below, and there was evidence which may have supported his argument below that Couse did not voluntarily consent. See *Jones*, 279 Kan. 71, Syl. ¶ 3 ("Mere acquiescence to a[PBT] does not establish voluntary consent."). Couse's written stipulation for trial, however, did not incorporate the evidence from the suppression hearing and the record on appeal does not show the trial court made any finding on the voluntariness issue.

Couse did reserve an objection in the stipulation "to any and all evidence contained in the following stipulation of fact which would have been suppressed had [his] motion to suppress been granted ." But Couse's stipulation to voluntary consent was not evidence which would have been suppressed. Indeed, Couse's stipulation to voluntary consent was not seized by the police but was specifically pled by Couse. This stipulation provided an exception to the Fourth Amendment's warrant requirement.

Parties are generally held to stipulations in criminal trials. *State v. Downey*, 27 Kan.App.2d 350, 359, 2 P.3d 191, *rev. denied* 269 Kan. 936 (2000). After careful consideration, we see no reason to relieve Couse of his stipulation to voluntary consent. The State, therefore, met its "burden to show such consent or waiver is voluntarily, intelligently, and knowingly given." *Jones*, 279 Kan. at 77.

Finally, even if Couse had shown the PBT was unconstitutional, he further stipulated in writing that he voluntarily consented to the *evidentiary* breath test. Because the PBT is inadmissible at trial, K.S.A.2010 Supp. 8–1012(d), any unconstitutionality associated with the PBT would become material only if the evidentiary breath test was tainted by the resulting illegal arrest. See *State v. Hill*, 281 Kan. 136, 152, 130 P.3d 1 (2006); *State v. Carver*, 577 N.W.2d 245 (Minn.App.1998). But Couse's voluntary consent to the evidentiary breath test would tend to purge any taint. See *Parker*, 282 Kan. 584, Syl. ¶ 4; *State v. Ninci*, 262 Kan. 21, 936 P.2d 1364 (1997).

Based on this record and the arguments raised by the parties, we do not find reversible error. Because it is unnecessary to address the constitutional issue, we affirm the district court on other grounds.

Affirmed.

All Citations
281 P.3d 597 (Table), 2012 WL 3135490

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Certificate of Service

This is to certify that a true and correct copy of the foregoing Brief was sent by emailing a copy to Jacqie Spradling, Bourbon County Attorney, bbca@bourboncountyks.org and to Kris Ailslieger, Deputy Solicitor General, at ksagappealsoffice@ag.ks.gov on 28th of June, 2019.

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