NOT DESIGNATED FOR PUBLICATION

No. 112,500

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALFRED VAN LEHMAN, JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; GREGORY L. WALLER, judge. Opinion filed November 13, 2015. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., PIERRON and LEBEN, JJ.

Per Curiam: Alfred Van Lehman appeals the district court's decision to correct a mistake it initially made in sentencing him. In 2009, after Van Lehman pled guilty to aggravated sexual battery, the court sentenced him to 31 months in prison with 24 months of postrelease supervision. But he should have been given lifetime postrelease supervision. The State filed a motion to correct the sentence in October 2013, just before Van Lehman finished serving it. The district court granted the motion at a hearing held after Van Lehman's initially announced sentence had expired.

On appeal, Van Lehman offers three reasons why the district court couldn't order lifetime supervision after he had finished his sentence. First, he asserts that the district court had no jurisdiction to resentence him after his sentence was complete. But K.S.A. 22-3504(1) allows a court to correct an illegal sentence *at any time*, and a sentence like this one that doesn't conform to statutory requirements is considered an illegal sentence. Second, he argues that resentencing him after he finished his sentence violated double-jeopardy rules. But the motion to correct his sentence was filed before he finished serving it, so Van Lehman had no legitimate reason to think that his sentence was final; thus, under accepted double-jeopardy caselaw, resentencing him didn't violate double-jeopardy safeguards. Third, he contends that under the invited-error doctrine, the State can't challenge the terms of his illegal sentence because it recommended the sentence in the first place. But the invited-error doctrine doesn't apply to an illegal sentence. There is no suggestion here that either party intended to mislead the court into ordering an illegal sentence. We affirm the district court's order imposing lifetime postrelease supervision.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, the State charged Van Lehman with one count of rape. Van Lehman and the State entered into a plea agreement in which the State agreed to recommend the lowest sentence possible under the Kansas Sentencing Guidelines if Van Lehman pled guilty to a lesser charge of aggravated sexual battery. Van Lehman pled guilty to the reduced charge in August 2009. At the plea hearing, the district court told Van Lehman that the aggravated-sexual-battery charge had a sentence range of 31 to 136 months in prison and 24 months of postrelease supervision.

At sentencing in October 2009, the State recommended that the district court sentence Van Lehman to 31 months in prison and 24 months of postrelease supervision. The district court accepted the recommendation and sentenced Van Lehman accordingly.

On October 15, 2013, the State filed a motion asking that the court correct Van Lehman's sentence to include lifetime postrelease supervision. Under K.S.A. 2009 Supp. 22-3717(d)(1)(G), a person convicted of a sexually violent crime committed on or after July 1, 2006, must be sentenced to lifetime postrelease supervision. The statute specifies which crimes are sexually violent crimes requiring lifetime postrelease supervision, and aggravated sexual battery is one of them. K.S.A. 2009 Supp. 22-3717(d)(2)(I).

The district court set a hearing for November 22, 2013. But Van Lehman finished serving his sentence, including the 24-month postrelease-supervision term, on November 13, 2013. Due to scheduling issues, the district court moved the hearing to December, but Van Lehman didn't show up. Van Lehman was eventually found, and the hearing was held on June 6, 2014. The district court then ordered that Van Lehman be placed on lifetime postrelease supervision. Van Lehman has appealed to this court.

ANALYSIS

The District Court Did Not Err in Granting the State's Motion to Correct an Illegal Sentence.

Van Lehman argues that the district court should not have granted the State's motion to correct an illegal sentence on three different grounds. First, he argues that the district court did not have jurisdiction to correct an illegal sentence after he had completely served it. Second, he contends that resentencing him violated the Double Jeopardy Clause of the United States Constitution. Third, he asserts that because the State recommended the sentence, it can't later challenge the sentence under what's known as the invited-error doctrine.

Van Lehman first argues that the district court lacked jurisdiction to correct his sentence. We have unlimited review of jurisdiction issues, meaning that we review the

issue independently, without any required deference to the district court. *State v. Charles*, 298 Kan. 993, 1002, 318 P.3d 997 (2014); *Uhlmann v. Richardson*, 48 Kan. App. 2d 1, 6, 287 P.3d 287 (2012), *rev. denied* 298 Kan. 1208 (2013). To the extent that this issue raises a question of statutory interpretation, we also review statutory-interpretation issues independently. *State v. Williams*, 299 Kan. 870, 872, 326 P.3d 1070 (2014); *State v. Howard*, 51 Kan. App. 2d 28, 32, 339 P.3d 809 (2014), *petition for rev. filed* January 5, 2015.

As a general matter, courts have no jurisdiction or authority to modify a legal sentence once it has been announced in open court when the defendant is sentenced. *State v. McKnight*, 292 Kan. 776, 779, 257 P.3d 339 (2011). But Kansas law grants courts the power to correct illegal sentences at any time:

> "The court may correct an illegal sentence *at any time*. The defendant shall receive full credit for time spent in custody under the sentence prior to correction. The defendant shall have a right to a hearing, after reasonable notice to be fixed by the court, to be personally present and to have the assistance of counsel in any proceeding for the correction of an illegal sentence." (Emphasis added.) K.S.A. 22-3504(1).

A sentence is illegal if it (1) is imposed by a court without jurisdiction, (2) doesn't comply with the statutory provision, either in character or term of authorized punishment, or (3) is ambiguous regarding the time and manner in which it is to be served. *State v. Taylor*, 299 Kan. 5, 8, 319 P.3d 1256 (2014).

Under K.S.A. 2009 Supp. 22-3717(d)(1)(G)-(d)(2), a person convicted of a sexually violent crime, including aggravated sexual battery, *must* be sentenced to lifetime postrelease supervision. See *State v. Ballard*, 289 Kan. 1000, 1012, 218 P.3d 432 (2009); *State v. Baber*, 44 Kan. App. 2d 748, 754, 240 P.3d 980 (2010), *rev. denied* 296 Kan. 1131 (2013). Because Van Lehman was instead sentenced to 24 months of postrelease supervision, his sentence was illegal; he doesn't dispute this.

It's well established that a court may correct an illegal sentence when the defendant has only partially served the sentence. *Ballard*, 289 Kan. at 1010, 1012; *State v. Fountaine*, 199 Kan. 434, 436, 430 P.2d 235 (1967). But it's less clear when, as here, the sentence has been fully served before the court enters the correcting order.

Van Lehman argues that the court has the authority and jurisdiction to correct an illegal sentence only while the defendant is still serving the sentence. He asserts that the phrase "under the sentence" in the second sentence of K.S.A. 22-3504 places that limit on the court's power to correct an illegal sentence "at any time." The State contends that "at any time" means just that and that the second sentence doesn't limit the timeframe but just ensures that a defendant is given credit for time served if the court later corrects his or her sentence. The district court likewise found that a court maintains jurisdiction to correct an illegal sentence "for all time."

Here, K.S.A 22-3504 allows a court to correct an illegal sentence "at any time." The second sentence merely guarantees that if a court corrects a sentence, the defendant gets credit for time served under the illegal sentence. Nothing in the second sentence purports to limit the power of the court to correct an illegal sentence at any time. Under the statute, the district court had jurisdiction to correct the sentence by ordering lifetime postrelease supervision, even after Van Lehman had finished serving his sentence.

In addition to the statute, Van Lehman relies on one appellate case, *State v. Alonzo*, 296 Kan. 1052, 297 P.3d 300 (2013), to support his argument. In *Alonzo*, the district court sentenced the defendant to 18 months of probation, but under the law, he could only be sentenced to 12 months unless the court made special findings. After Alonzo had served the statutory 12 months, the district court revoked his probation and resentenced him to the extended probation term after making the necessary findings. The Kansas Supreme Court found that the district court lacked jurisdiction to resentence him

after he had served the statutory 12-month term. 296 Kan. at 1059. Van Lehman's case is distinguishable because Van Lehman was under-sentenced; no portion of his postrelease-supervision term complied with the statute. In addition, in *Alonzo*, the probation term could exceed 12 months *only* if the district court made special findings at sentencing—but it hadn't made them. In Van Lehman's case, no findings were needed; the district court was simply required to sentence all defendants convicted of aggravated sexual battery to lifetime postrelease supervision.

Van Lehman also asserts that imposing postrelease supervision after he finished his sentence violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Because Van Lehman failed to raise this claim at the district court, the State argues that this court shouldn't consider it.

Generally, this court will not consider a constitutional claim raised for the first time on appeal unless it falls within one of three exceptions: (1) the newly asserted claim involves only a question of law based on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Van Lehman also failed to explain why this court should consider the issue for the first time on appeal, as Supreme Court Rule 6.02(a)(5) requires. (2014 Kan. Ct. R. Annot. 40). See *Godfrey*, 301 Kan. at 1044. But this issue is one that is argued only on admitted facts, would determine the appeal if we rule in Van Lehman's favor, and involves a fundamental right. See *State v. Walker*, 283 Kan. 587, Syl. ¶ 14, 153 P.3d 1257 (2007). Accordingly, we will consider Van Lehman's argument.

We must begin with the Double Jeopardy Clause itself. It states that no person can "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The United States Supreme Court has interpreted this to protect an individual

from being (1) tried again for the same crime after an acquittal, (2) tried again for the same crime after a conviction, or (3) punished more than once for the same crime. *United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); *State v. Cady*, 254 Kan. 393, 396, 867 P.2d 270 (1994). Because double jeopardy prohibits multiple punishments for the same crime, a court can't increase a defendant's sentence after he or she has a legitimate reason to believe that the sentence is final. *DiFrancesco*, 449 U.S. at 135-36, 139; *United States. v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987) (analyzing *DiFrancesco*). Whether a defendant has a legitimate expectation of finality is influenced by many factors, including completion of the sentence, passage of time, pendency of an appeal or review of sentencing, or the defendant's misconduct in obtaining the sentence. *State v. Hardesty*, 129 Wash. 2d 303, 311, 915 P.2d 1080 (1996); *State v. Robinson*, 2014 WI 35, ¶ 32, 354 Wis. 2d 351, 367, 847 N.W.2d 352 (2014).

Kansas courts have not addressed whether a defendant has a legitimate expectation of finality in an illegal sentence once he or she has fully served it. Several federal courts, applying a version of the Federal Rules of Criminal Procedure that then allowed illegal sentences to be corrected at any time, have concluded that a defendant has a legitimate expectation of finality after completely serving the sentence. *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993); *United States v. Arrellano-Rios*, 799 F.2d 520, 525 (9th Cir. 1986). On the other hand, the United States Court of Appeals for the Tenth Circuit concluded that a defendant never has a legitimate expectation of finality in an illegal sentence because it is always subject to modification. *United States v. Rourke*, 984 F.2d 1063, 1066 & n.3 (10th Cir. 1992); *United States v. Dominguez-Carmona*, No. 99-2106, 1999 WL 1276912, at *2 (10th Cir. 1999) (unpublished opinion) (upholding resentencing of defendants 2 years after they had finished their sentences).

In support of his argument, Van Lehman cites a New York Court of Appeals case, *People v. Williams*, 14 N.Y.3d 198, 899 N.Y.S.2d 76, 925 N.E.2d 878 (2010). In

Williams, defendants hadn't been sentenced to mandatory postrelease-supervision terms and were resentenced only after they had been fully released from prison. 14 N.Y.3d at 209-10. The court determined that there must be some time limit on courts' "inherent authority" to correct illegal sentences. 14 N.Y.3d at 212, 217; see also *Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir. 1978) (expressing "concern that the power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit"). The court held that after the defendants completed their sentences, they had a legitimate expectation that their sentences were final and that they could not be resentenced without violating double jeopardy. *Williams*, 14 N.Y.3d at 217, 220. Other state courts have also adopted similar holdings. *Commonwealth v. Selavka*, 469 Mass. 502, 513, 14 N.E.3d 933 (2014); *State v. Schubert*, 212 N.J. 295, 311-13, 53 A.3d 1210 (2012); *State v. Holdcroft*, 137 Ohio St. 3d 526, 533, 1 N.E.3d 382 (2013).

But few cases have addressed the situation we confront, in which the State files a motion to correct the sentence before it ends but the resentencing occurs only after the sentence is completed. In *State v. Horton*, 331 N.J. Super. 92, 751 A.2d 141 (2000), the New Jersey Superior Court (Appellate Division) addressed a similar case and found no violation of double jeopardy. The sentencing court had failed to sentence the defendant to a mandatory lifetime-supervision term, resulting in an illegal sentence. 311 N.J. Super. at 95. The prosecution filed a motion to correct the sentence in July 1997, but the judge did not order the correction until 2 weeks *after* the defendant had finished his probation term in January 1998. 331 N.J. Super. at 95-96. In *Schubert*, the New Jersey Supreme Court held that while defendants can't generally be resentenced to lifetime supervision after completing their sentences, that rule would not protect Horton because the State in his case had sought to amend the sentence before the defendant had completed it. 212 N.J. at 310-11. Here, the State likewise filed to correct Van Lehman's sentence before it was completed, but resentencing occurred after it was complete.

The State's motion was immediately served on Van Lehman's attorney. He has not contested this method of service for the motion, and he has not provided any evidentiary basis in our record demonstrating that he didn't receive notice of the motion while he was still under the originally entered postrelease-supervision period. Under these circumstances, Van Lehman didn't have a legitimate expectation that his sentence was final. Therefore, resentencing Van Lehman didn't violate double jeopardy.

Finally, Van Lehman argues that the State shouldn't be allowed to challenge the illegal sentence because it recommended the 24-month postrelease-supervision term in the plea agreement and at sentencing. This principle is known as the invited-error doctrine; it prevents a party from asking a district court to take a particular action and then complaining about it on appeal. *State v. Ruiz*, 51 Kan. App. 2d 212, 223, 343 P.3d 544 (2015). But Kansas courts have repeatedly found that the invited-error doctrine does not apply to the correction of an illegal sentence. *State v. Dickey*, 301 Kan. 1018, 1033-34, 350 P.3d 1054 (2015) (challenging classification of prior conviction); *LaBelle*, 290 Kan. 529, 532-33, 231 P.3d 1065 (2010) (challenging criminal history and persistent sex-offender status); *State v. McCarley*, 287 Kan. 167, 176, 195 P.3d 230 (2008) (doctrine inapplicable when error leading to illegal sentence concerns jurisdiction).

The primary purpose of the invited-error doctrine is to discourage a party from unfairly leading the court to make a reversible error; as a rule created by the judiciary, it should be tailored to serve this purpose "without unnecessarily thwarting the ends of justice." *State v. Hargrove*, 48 Kan. App. 2d 522, 553, 293 P.3d 787 (2013). Applying the invited-error doctrine here would do nothing to serve its purpose; the State didn't intentionally mislead the district court to gain some advantage. There is no suggestion in our record that any party sought to mislead the court; the record simply suggests that the parties overlooked the statutory requirement for lifetime postrelease supervision. Moreover, a defendant can't agree to an illegal sentence. *State v. Weber*, 297 Kan. 805, 815, 304 P.3d 1262 (2013); *State v. Jones*, 293 Kan. 757, 757-58, 268 P.3d 491 (2012).

We conclude that the invited-error rule doesn't apply here, even though the State had recommended the illegal sentence it later sought to correct.

We affirm the district court's judgment.