

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 114,032

STATE OF KANSAS,
Appellee,

v.

ERICK DONALDSON,
Appellant.

SYLLABUS BY THE COURT

1.

An appellate court reviews a district court's summary denial of a motion to correct an illegal sentence under K.S.A. 22-3504(1) de novo because the reviewing court has the same access to the motions, records, and files. The reviewing court, like the district court, must determine whether the documents conclusively show the defendant is not entitled to relief.

2.

Whether a sentence is illegal is a question of law over which an appellate court has unlimited review. An illegal sentence under K.S.A. 22-3504(1) is one: (a) imposed by a court without jurisdiction; (b) that does not conform to the statutory provisions, either in the character or the term of the punishment authorized; or (c) that is ambiguous with respect to the time and manner in which it is to be served.

3.

The classification of a prior crime as a person or nonperson felony for criminal history purposes is a question of state statutory law. A misclassification results in an illegal sentence that can be corrected at any time.

Appeal from Sedgwick District Court; JOHN J. KISNER, JR., judge. Opinion filed June 2, 2017.
Reversed and remanded with directions.

Carl F.A. Maughan, of Maughan Law Group LC, of Wichita, and *Sean M.A. Hatfield*, of the same firm, were on the brief for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Erick Donaldson was convicted of sale of cocaine. He was sentenced under the Kansas Sentencing Guidelines Act (KSGA). See K.S.A. 21-4701 *et seq.* His criminal history at that time included a 1990 felony adjudication for burglary, which the district court classified as a person crime for sentencing purposes.

In 2014, Donaldson filed a motion to correct an illegal sentence, claiming the district court's classification of the 1990 felony adjudication for burglary was an error under *State v. Dickey*, 301 Kan. 1018, 1039-40, 350 P.3d 1054 (2015) (*Dickey I*) (holding pre-KSGA convictions and juvenile adjudications of burglary under K.S.A. 21-3715 must be classified as nonperson felonies). The district court summarily denied him relief. We reverse based on *Dickey I*, vacate the sale of cocaine sentence, and remand for resentencing with directions to reclassify the 1990 burglary adjudication as a nonperson felony.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Donaldson of first-degree felony murder and sale of cocaine—the sale occurred in 2002—in two separate cases that were consolidated for trial. The presentence investigation reports revealed nine prior convictions, including a 1990 Kansas juvenile adjudication for burglary, scored as a person felony.

At the time Donaldson committed the cocaine offense, it was a severity level 3 drug grid felony. K.S.A. 65-4161(a); see K.S.A. 21-4705. Under the KSGA, the presumptive sentencing range for a severity level 3 drug grid felony varied based on the offender's criminal history score. See K.S.A. 21-4705(a), (d). The district court applied a criminal history score of "B" and sentenced Donaldson to 44 months' imprisonment—the center of the range applicable to an offender with that criminal history score. The court ordered that this sentence be served consecutive to a hard 20 life sentence it imposed for the murder conviction.

Under the KSGA, a criminal history score of "B" applied if "[t]he offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies." K.S.A. 21-4709. Donaldson argued below that the correct criminal history score was "C." This score applied if "[the] offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult conviction or juvenile adjudication for a nonperson felony." K.S.A. 21-4709.

In 2014, Donaldson filed two motions to correct his sale of cocaine sentence, arguing he should have been sentenced using a criminal history score of "C" because his 1990 juvenile adjudication should have been scored as a nonperson felony. The first motion relied on this court's decision in *State v. Murdock*, 299 Kan. 312, 319, 323 P.3d

846 (2014) (holding person/nonperson classification of prior out-of-state offenses for purposes of calculating criminal history score determined by comparing prior offense to comparable Kansas crime at time of prior offense, resulting in nonperson classification of all pre-KSGA out-of-state offenses), *overruled by State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015), *cert. denied* 136 S. Ct. 865 (2016). The second relied, in part, on a Court of Appeals' decision in *State v. Dickey*, 50 Kan. App. 2d 468, 329 P.3d 1230 (2014), *aff'd State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015).

The district court summarily denied Donaldson relief on the merits based on *Dickey I*. Donaldson argues the district court erred because the burglary adjudication offenses should not have been classified as person offenses. He timely appealed. Jurisdiction is proper. See K.S.A. 2016 Supp. 22-3601(b)(3) (Supreme Court has jurisdiction over a case in which life sentence is imposed); *State v. Sims*, 294 Kan. 821, 823-24, 280 P.3d 780 (2012) (Supreme Court has jurisdiction over motion to correct an illegal sentence filed in a case in which defendant received a life sentence).

We focus exclusively on the motion based on *Dickey I*, which is dispositive. Donaldson's *Murdock*-based claim would afford him no further relief since his criminal history score includes a post-KSGA person felony, and, as explained below, a pre-KSGA nonperson felony. See K.S.A. 21-4709 (defining criminal history score "C").

DICKEY I REQUIRES REVERSAL AND REMAND

On appeal, Donaldson argues the 1990 juvenile adjudication for burglary should have been scored as a nonperson felony. We agree. Because the burglary statute at the time of Donaldson's 1990 juvenile adjudications did not require proof the crime involved a "dwelling," the sentencing court could not have concluded the crime in fact involved a dwelling, as required to classify it as a person crime under K.S.A. 2002 Supp. 21-

4711(d). See *Dickey I*, 301 Kan. at 1039-40. But the sentencing court did so, resulting in a higher criminal history score than otherwise would have applied. The sentence imposed based on this erroneous criminal history score was illegal. See *State v. Dickey*, 305 Kan. 217, 220, 380 P.3d 230 (2016) (*Dickey II*).

Standard of Review

Under K.S.A. 22-3504(1), the court may correct an illegal sentence at any time. An illegal sentence under K.S.A. 22-3504(1) is one: (1) imposed by a court without jurisdiction; (2) that does not conform to the statutory provisions, either in character or the term of the punishment authorized; or (3) that is ambiguous with respect to time and manner in which it is to be served. *State v. Gilbert*, 299 Kan. 797, 801, 326 P.3d 1060 (2014).

An appellate court reviews a district court's summary denial of a motion to correct an illegal sentence under K.S.A. 22-3504(1) de novo because the appellate court has the same access to the motions, records, and files. 299 Kan. at 801. In doing so, this court, like the district court, must determine whether the documents conclusively show Donaldson is not entitled to relief. 299 Kan. at 801.

Discussion

At the time of Donaldson's sale of cocaine offense, the KSGA was mostly silent about how to determine whether a pre-KSGA offense should be scored as a person or nonperson crime. See *Keel*, 302 Kan. at 572. But it was not silent on how to score pre-KSGA Kansas burglary adjudications:

"Prior burglary . . . juvenile adjudications will be scored for criminal history purposes as follows:

"(1) As a prior person felony if the prior conviction or adjudication was classified as a burglary as described in subsection (a) of K.S.A. 21-3715

"(2) As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary as described in subsection (b) or (c) of K.S.A. 21-3715

"The facts required to classify prior burglary . . . juvenile adjudications must be established by the state by a preponderance of the evidence." K.S.A. 2002 Supp. 21-4711(d).

To classify Donaldson's 1990 burglary adjudication as a person felony under this statute, the sentencing court would have been required to find the burglary involved a "dwelling." See K.S.A. 21-3715(a) (defining burglary as "knowingly and without authority entering into or remaining within any . . . [structure] which *is a dwelling*"). Although the record does not reveal when the prior burglary was committed, as the burglary statute existed at the time of the 1990 juvenile adjudication—and as it has existed since 1969—it did not require a showing that the structure burglarized was a "dwelling." See K.S.A. 1990 Supp. 21-3715.

In *Dickey I*, the court held that under these circumstances a defendant's pre-KSGA burglary adjudication must be classified as a nonperson felony. 301 Kan. at 1039-40 ("Because burglary of a 'dwelling' . . . was not included within the statutory elements making up Dickey's prior burglary adjudication, the burglary adjudication should have been classified as a nonperson felony."). The court reasoned that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), a sentencing court may not engage in factfinding "by attempting to determine whether a defendant's actions satisfied an element not contained within the statute under which the defendant's prior

conviction arose." 301 Kan. at 1038 (citing *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276, 2281-87, 186 L. Ed. 2d 438 [2013]). And since the burglary statute that formed the basis of the pre-KSGA adjudication did not require proof the structure burglarized was a dwelling, the sentencing court could not constitutionally have determined the prior adjudication involved a dwelling. Accordingly, the offense should have been classified as a nonperson felony. The *Dickey I* court held:

"[T]he district court was constitutionally prohibited from classifying Dickey's prior burglary adjudication as a person felony because doing so would have necessarily resulted from the district court making or adopting a factual finding that went beyond simply identifying the statutory elements that constituted the prior burglary adjudication. Because burglary of a 'dwelling' (as that term is defined in K.S.A. 2014 Supp. 21-5111[k]) was not included within the statutory elements making up Dickey's prior burglary adjudication, the burglary adjudication should have been classified as a nonperson felony." 301 Kan. at 1039-40.

Donaldson's case arrives in a different procedural posture than *Dickey I* in that *Dickey I* was a direct appeal. But the two cases are otherwise factually indistinguishable. Accordingly, if *Dickey I* applies, Donaldson's sale-of-cocaine sentence should be vacated and the case should be remanded for resentencing on that count. The State concedes as much, but makes three arguments why *Dickey I* should not dictate the outcome.

First, the State contends, Donaldson's *Dickey I*-based argument is a constitutional challenge to his sentence, "not an illegal sentence claim" that can be raised at any time under K.S.A. 22-3504(1). This argument relies primarily on *State v. Moncla*, 301 Kan. 549, Syl. ¶ 4, 343 P.3d 1161 (2015) (noting sentence imposed in violation of constitution is not an "illegal sentence under K.S.A. 22-3504"), and *State v. Mitchell*, 284 Kan. 374, Syl. ¶ 2, 162 P.3d 18 (2007) ("Because the definition of an illegal sentence does not include a claim that the sentence violates a constitutional provision, a defendant may not

file a motion to correct an illegal sentence based on constitutional challenges to his or her sentence."). Second, the State argues Donaldson abandoned the claim when he failed to raise it in his direct appeal. And, third, it asserts *Dickey I* should not be applied retroactively.

The court rejected these arguments in *Dickey II*. As with Donaldson's case, *Dickey II* was not a direct appeal. It was an appeal from the revocation of probation in multiple cases consolidated for appeal, in which Dickey challenged the legality of the underlying sentences imposed when probation was initially granted. The *Dickey II* court concluded that because an illegal sentence can be corrected at any time, "the procedural distinctions . . . between *Dickey I* and *Dickey II* fade into irrelevance and the substantive holding of *Dickey I* must control." 305 Kan. at 219. It reasoned,

"[T]he challenge presented to Dickey's sentences in both *Dickey I* and [*Dickey II*] are challenges to the statutory propriety of the classification at issue—albeit with a thick overlay of constitutional law . . . —there is no impediment to Dickey's claim that the underlying sentences he received after his probation was revoked in the three underlying cases are illegal. And that claim is identical to, and controlled by, our determination in *Dickey I* that the exact prior conviction at issue here was in fact misclassified. *The State's remaining efforts to impose a procedural bar to the relief Dickey seeks—arguments concerning retroactivity and res judicata—are all unavailing in the context of a motion to correct an illegal sentence which can be made at any time.*" (Emphasis added.) 305 Kan. at 221-22.

Applying *Dickey I* and *Dickey II*, we hold the sentencing court improperly classified Donaldson's 1990 burglary adjudication as a person felony, resulting in an incorrect criminal history score, and, unavoidably, an illegal sentence. Accordingly, we reverse the district court's judgment summarily denying Donaldson relief, vacate the 44-month sentence imposed for Donaldson's sale of cocaine conviction, and remand the case

for resentencing with directions that Donaldson's 1990 burglary adjudication be reclassified as a nonperson felony.

Reversed and remanded with directions.