Case Law Summary: Kansas

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This summary of Kansas appellate case law addresses four topics: the availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts permitting upward departure under *Blakely v. Washington*, and other sentencing decisions.

1. Availability of and General Standards for Appellate Review.

The Kansas Sentencing Guidelines, which are promulgated in statute, provide for appellate review at the request of the defendant or the state but only when the sentencing court pronounces a sentence that falls outside of the presumptive guidelines range or when a sentence within the presumptive range involves an error in calculation of crime severity level or criminal history category.[1] Kansas appellate courts have interpreted this language strictly, holding that when the trial court imposes a sentence within the presumptive guidelines range for the crime, there exists no right to appeal even when the court denies a motion for departure.[2] Indeed, even a claim of constitutional error in sentencing does not confer appellate jurisdiction when the sentence falls within the presumptive range.[3] When the sentence is a departure, the grounds for appeal are broader, including not only improper calculation of severity level and criminal history but also that the sentence resulted from partiality, prejudice, oppression, or corrupt motive.[4] Case law has provided that such a showing requires meeting a high bar, as the burden is placed on the party asserting error.[5] In addition, where the departure was pursuant to a plea agreement that was accepted by the sentencing court, appellate review remains unavailable.[6]

The scope of review is limited to the exceptions provided in statute. If the appeal does not fall within the statutorily granted avenues for appeal, no appeal is allowed. The statute providing that a defendant may appeal a departure sentence makes no distinction between a favorable or unfavorable departure.[7] If multiple current offenses are to be sentenced, the decision to pronounce sentences to be served concurrently or consecutively is not grounds for appeal if the sentences are arrived at using the formula provided in statute.[8] However, if one of the offenses is an off-grid crime, the sentence given is not "presumptive" as provided by statute, and appellate review is not foreclosed.[9]

2. Standards and Allowable Grounds for Departure.

In an appeal from a departure sentence under the Kansas Sentencing Guidelines, the sentence review is limited to whether the trial court's findings of fact and reasons for departing "are supported by the evidence in the record, and constitute substantial and compelling reasons for departure."[10]

In addressing the evidentiary question, the appellate court must determine whether the departure factors cited by the trial court are supported by substantial evidence or whether the court's findings are clearly erroneous.[11] "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion."[12]

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[1] Kan. Stat. Ann. § 21- 6820(a), (c), (e) (2019).
[2] *State v. Williams*, 153 P.3d 566, 569 (Kan. Ct. App. 2007).
[3] *State v. Huerta*, 247 P.3d 1043, 1049–50 (Kan. 2011).
[4] Kan. Stat. Ann. § 21-6820(e) (2019).
[5] *See, e.g., State v. Heywood*, 783 P.2d 890, 894 (Kan. 1989).
[6] Kan. Stat. Ann § 21-6820(c)(2) (2019).
[7] State v. Looney, 327 P.3d 425, 429 (Kan. 2014).
[8] *State v. McCallum*, 895 P.2d 1258, 1262–64 (Kan. Ct. App. 1995).
[9] *State v. Ross*, 289 P.3d 76, 84–85 (Kan. 2012).
[10] Kan. Stat. Ann. § 21-6820(d) (2019).
[11] *State v. Gideon*, 894 P.2d 850, 872 (Kan. 1995), citing Kan. Stat. Ann. § 21-4721(d)(1993) (now codified as § 21-6820(d)(2019)).
[12] *State v. Grady*, 900 P.2d 227, 233 (Kan. 1995).

Following the adoption of the Sentencing Guidelines in 1993, case law interpreting the guidelines departure standard focused on defining the phrase "substantial and compelling," and outlining the level of detail courts must provide when announcing the "substantial and compelling" reasons for a departure.

Two early cases demonstrated instances where departures were found not to be substantial and compelling. In the 1995 case of *State v. Rhoads*,[13] the Kansas Court of Appeals found the word "substantial" required reasons for departure that had "substance and [were] not ephemeral."[14] The court articulated that an interest, or reason, becomes "compelling" only when the facts of the case force the court to "leave the status quo or go beyond what is ordinary."[15] Applying this two-part definition to the *Rhoads* case, the appellate court found that the sentencing court's statement that an offender had an "extensive criminal history" did not reach the level of detail necessary for a departure. On these grounds, the appellate court remanded the case with the instruction that while past criminal behavior may serve as grounds for departure, the sentencing court must explain how and why it used that information. The *Rhoads* case illustrates that while Kansas appellate courts are generally deferential toward the trial court's finding of factors justifying departure, they require clear explanation of why those factors are thought to be "substantial and compelling." In *State v. Caldwell*, an appellate court further emphasized that a departure reason is only compelling when the facts "force the court to leave the status quo." In that case, the departure reason articulated by the sentencing court was "legislative intent to punish persons shooting at occupied houses more severely than persons shooting at unoccupied houses." But as the *Caldwell* court noted, the legislature's intent to punish some crimes more severely than others is already incorporated in the sentencing grid through the assignment of severity levels, so one of the elements of the charged crime cannot be used as a substantial and compelling factor to justify departure from the presumptive sentence.[16]

A 1995 Kansas Supreme Court case, *State v. Grady*, provides guidance on what is "substantial and compelling," and what factors sentencing courts may consider when deciding whether to grant a departure sentence.[17] First, *Grady* makes clear that "substantial and compelling" factors justifying a departure in one case may not justify a departure in a similar case.[18] Courts holistically evaluate the crime committed and the present departure factors, and use their discretion to determine if a departure is justified. This discretion is to be guided by the background principles and purposes of the Sentencing Guidelines.[19] *Grady* also finds that when a factor is not listed in statute as either mitigating or aggravating, if there is reasonable doubt that the legislature considered that factor when establishing the sentencing range for a crime, the court has the discretion to depart.[20] The Kansas Supreme Court cited an appellate case, *State v. Richardson*, for an example of this discretion, approving of the appeals court's reasoning that because the guidelines do not consider the time elapsed since an offender's last felony offense in calculating the criminal history score, the sentencing court may do so. The *Grady* court further held that criminal history, while generally not a departure factor because it is already accounted for in calculating the presumptive sentence, may be used as a departure factor if taken in conjunction with other factors, such as a failed, but not meritless defense, or a finding that an offender is unlikely to reoffend.[21]

Whether the factors cited by the trial court are "substantial and compelling" constitutes a question of law.[22] Kansas courts also hold that it is not necessary that all of the reasons cited by the sentencing court be

[13] *State v. Rhoads*, 892 P.2d 918 (Kan. Ct. App. 1995).
[14] *State v. Rhoads*, 892 P.2d at 925.
[15] *State v. Rhoads*, 892 P.2d at 925.
[16] *State v. Caldwell*, 901 P.2d 35, 43 (Kan. Ct. App. 1995).
[17] *State v. Grady*, 900 P.2d 227 (Kan. 1995).
[18] *State v. Grady*, 900 P.2d at 235–36. *See State v. McKay*, 26 P.3d 58 (Kan. 2001).
[19] *State v. Grady*, 900 P.2d at 235–39.
[20] *State v. Grady*, 900 P.2d at 238.
[21] *State v. Grady*, 900 P.2d at 238.
[22] *State v. Grady*, 900 P.2d at 238.

substantial and compelling, so long as one of them is[23] or so long as the factors collectively constitute a substantial and compelling basis for departure.[24] Upon finding that the sentencing court has identified a departure factor that is substantial and compelling and supported by evidence on the record, the appeals court examines whether the degree of the departure was proper.[25] Reviewing only for abuse of discretion, the appellate court gives a great deal of deference to the sentencing court's judgment on the proper degree of a departure.[26]

While the legislature provided a list of mitigating and aggravating factors that the court may consider in determining if substantial and compelling reasons for departure exist, that list is *nonexclusive*. Kansas appellate courts have recognized a number of recurring factors outside of those provided in the guidelines, including:

- Age and immaturity of defendant, while not dispositive standing alone, may be considered.[27]
- Time elapsed since the defendant's last felony conviction.[28]
- Failure on probation.[29]
- Commission of new offenses while on parole.[30]
- Employment or family status.[31]
- Unamenability to probation.[32]

3. Constitutional Requirements for Proof of Facts Permitting Upward Departure under *Blakely v. Washington*.

Following the Supreme Court's *Apprendi* decision,[33] the Kansas Supreme Court anticipated *Blakely*[34] by three years and determined, in *State v. Gould*, that upward departures under the sentencing guidelines as then formulated were unconstitutional.[35] The standard in place, which allowed for upward departure from a presumptive sentence if the sentencing judge found by a preponderance of the evidence that an aggravating factor was present, was held to violate the criminal defendant's Sixth Amendment right to a trial by jury, and Fourteenth Amendment due process rights, as it allowed for punishment which went beyond that authorized by a jury verdict.[36] The Kansas Supreme Court found that an upward departure may only be justified if the aggravating factors justifying such a departure are proved to a jury beyond a reasonable doubt. Similar reasoning, that the presumptive sentence range given by the guidelines constituted the most severe sentence authorized by the jury's verdict,[37] was adopted by the U.S. Supreme Court three years later in *Blakely*. Following the *Gould* decision, the Kansas legislature amended the sentencing guidelines to require any evidence supporting an upward departure to be submitted to a jury.[38] The right to a jury trial on the evidence supporting an upward durational departure may be waived, but a

[23] *State v. Zuck*, 904 P.2d 1005, 1012 (Kan. Ct. App. 1995).
[24] *State v. Brown*, 387 P.3d 835, 852 (Kan. 2017).
[25] *State v. Favela*, 911 P.2d 792, 809–11 (Kan. 1996).
[26] *State v. Favela*, 911 P.2d at 809–11.
[27] *State v. Favela*, 911 P.2d at 807.
[28] *State v. Richardson*, 901 P.2d 1, 7–8 (Kan. Ct. App. 1995).
[29] *State v. Yardley*, 978 P.2d 886, 891 (Kan. 1999).
[30] *State v. Mitchell*, 939 P.2d 879, 889 (Kan. 1997).
[31] *State v. Crawford*, 908 P.2d 638, 640 (Kan. Ct. App. 1995).
[32] *State v. Green*, 172 P.3d 1213, 1219 (Kan. Ct. App. 2007).
[33] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[34] *Blakely v. Washington*, 542 U.S. 296 (2004).
[35] *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).
[36] *State v. Gould*, 23 P.3d at 814.
[37] *State v. Gould*, 23 P.3d at 812–14.
[38] Kan. Stat. Ann. § 21-6817(b) (2019).

plea of guilty to the offense, standing alone, does not constitute a voluntary and knowing waiver of the right.[39]

After determining that the legislative remedy for upward durational departures enacted after *Apprendi* and *Gould* satisfied *Blakely* challenges, the Kansas Supreme Court examined whether the variability within the presumptive ranges raised any *Blakely* issues in *State v. Johnson*.[40] Reasoning that the Sentencing Guidelines authorize sentencing judge discretion within the presumptive range without departing, it found no constitutional violation.[41]

When addressing whether an upward dispositional departure required the same Sixth Amendment safeguards required by *Blakely*, the Kansas Supreme Court held in *State v. Carr* that they were not necessary.[42] The court found that *Apprendi* did not apply because the dispositional decision (prison versus probation) does not impact the amount of punishment authorized by the jury verdict, but only "determines where an individual's sentence will be supervised;"[43] the court also viewed probation as a privilege and an act of grace by the sentencing judge, not a right of the defendant.[44]

4. Constitutional Requirements for Proof of Facts That Increase the Minimum Sentence under *Alleyne v. United States*.

Following *Alleyne*,[45] a number of challenges were brought asking whether a judicial determination of a prior conviction as a person or nonperson offense violated a defendant's Sixth Amendment right to a trial by jury. In *State v. Murdock* (2014), the Kansas Supreme Court held that the court was required to compare out-of-state offenses with those that existed under Kansas law in effect at the time the crimes were committed. This meant that if an out-of-state offense occurred before the Kansas Sentencing Guidelines Act went into effect in 1993, it could not be considered a "person" crime: "person" and "non-person" crimes were not distinguished in Kansas before that time.[46] This spurred many other cases involving reclassification of past out-of-state convictions.[47] In 2015, the *Murdock* decision was overruled by *State v. Keel*, which held that prior convictions or adjudications could be classified as a "person" or "non-person" crime based on the classification in effect for the comparable Kansas offense at the time the *current crime of conviction* was committed.[48] Additionally, the *Keel* court held that whether a prior conviction should be classified as a person or nonperson offense involves the interpretation of the Kansas Sentencing Guidelines Act,[49] a classification that generally does not require the type of factfinding ordinarily at issue in *Apprendi* cases but rather a question of law within the court's purview and therefore does not implicate the Sixth Amendment.[50]

In *State v. Miller*,[51] the petitioner suggests that *Alleyne* undermines the holding in *Carr*, which held that the *Apprendi* rule does not apply to the court's decision to impose a prison rather than probation sentence (dispositional departure). The petitioner in *Miller* argued that because probation was the presumptive minimum sentence per the sentencing guidelines, and any upward departure requires additional findings of fact, those facts must be submitted to a jury. The *Miller* court disagreed stating *Carr* is distinguishable from *Alleyne* because *Alleyne* dealt with a durational departure whereas *Carr* dealt with a dispositional

[39] State v. Horn, 238 P.3d 238, 246 (Kan. 2010).
[40] *State v. Johnson*, 190 P.3d 207 (Kan. 2008).
[41] *State v. Johnson*, 190 P.3d at 225.
[42] *State v. Carr*, 53 P.3d 843, 852–53 (Kan. 2002).
[43] *State v. Carr*, 53 P.3d at 849.
[44] *State v. Carr*, 53 P.3d at 850.
[45] *Alleyne v. United States*, 570 U.S. 99 (2013).
[46] *State v. Murdock*, 323 P.3d 846, 850-851 (Kan. 2014).
[47] *See, e.g., State v. Sims*, 395 P.3d 413 (Kan. 2017), *State v. Collier*, 394 P.3d 1164 (Kan. 2017).
[48] *State v. Keel*, 357 P.3d 251, 260-261 (Kan. 2015).
[49] *State v. Keel*, 357 P.3d at 259. *See also State v. Collier*, 394 P.3d at 1169; *State v. Campbell*, 407 P.3d 240, 245 (Kan. 2017).
[50] *State v. Collier*, 394 P.3d at 1169.
[51] *State v. Miller*, 2016 WL 4259972 (Kan. Ct. App. 2016).

departure so the *Carr* decision remains the precedent in Kansas and Miller's dispositional departure does not implicate *Alleyne*.[52] However, the dissent in *Carr* points out the Kansas Sentencing Guidelines Act "make clear that the presumptive sentence for a crime is not only defined by the numbers in the grid box alone, but also by whether the box lies above or below the dispositional line. If the crime severity and criminal history dictate a sentence within a shaded grid box, the presumptive sentence is probation. The legislature created and placed the dispositional line and, in doing so, defined the maximum punishment for a crime not only in terms of the length of a sentence but also in terms of whether the punishment itself was to be prison or probation."[53] It is then arguable that *Alleyne* may have an effect on this dispositional versus durational distinction and the Kansas Supreme Court could revisit this issue in the future.

5. **Other Important Sentencing Decisions**

Foundational Concept of Interpretation: When a conflict exists between the sentencing guidelines statute and a more specific statute, the more specific statute will hold even if it was enacted prior to the Kansas Sentencing Guidelines Act unless it is apparent the legislature intended otherwise.[54]

Multiple Current Offenses: When a judge issues multiple consecutive sentences for different offenses, Kansas has a "double-rule" that caps the maximum sentence to two times the length of the on-grid sentence of the primary offense. The primary offense is designated by the judge and is the offense with the highest severity ranking. The double-rule does not apply to off-grid offenses.[55]

Interpreting "Convictions" for Sentencing Enhancement Purposes: In the 2009 case of *State v. Dale*, the Kansas Court of Appeals held that prior juvenile adjudications cannot be treated as criminal convictions for purposes of enhancement under the guidelines.[56]

Decision Affecting Dispositional Departures: The Kansas sentencing guidelines have a provision changing the presumptive sentence from nonprison to prison for crimes in which a firearm was used. The courts have interpreted "use" broadly, including use as a bludgeon without being fired, stating this construction is consistent with the legislature's intent to address public concern over increased number of crimes committed involving firearms.[57]

[52] *State v. Miller*, 2016 WL 4259972 at *8.
[53] *State v. Carr*, 53 P.3d at 853 (Six, J., dissenting).
[54] *State v. Binkley*, 894 P.2d 907 (Kan. Ct. App. 1995). *See also State v. Turner*, 272 P.3d 19, 22 (Kan. 2012).
[55] *State v. Louis*, 384 P.3d 1, 11 (Kan. 2016).
[56] *State v. Dale*, 220 P.3d 1102, 1104 (Kan. Ct. App. 2009).
[57] *State v. George*, 891 P.2d 1118, 1125 (Kan. Ct. App. 1995).