Kansas Sentencing Commission

The Latest in Kansas Criminal Sentencing

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Overview

- Recent Kansas appellate cases
- Recent Sentencing Data & electronic PSI update
- Q&A

Recent Case Law Affecting Criminal Sentencing in Kansas

KANSAS OPINIONS

UNPUBLISHED OPINIONS

JAIL CREDIT

FAQ

How does *State v Hopkins* affect the calculating of jail credit?

Jail Credit
K.S.A. 2023 Supp. 21-6615(a)

In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated ***pending the disposition of the defendant's case***. In recording the commencing date of such sentence the date as specifically set forth by the court shall be used as the date of sentence and all good time allowances as are authorized by the secretary of corrections are to be allowed on such sentence from such date as though the defendant were actually incarcerated in any of the institutions of the state correctional system.

Since 1978 we have held that the language in K.S.A. 2022 Supp. 21-6615(a) requires the sentencing judge to award a defendant credit for all time spent in custody "solely" on the charge for which the defendant is being sentenced while awaiting disposition of his or her case, and that a defendant is not entitled to credit for time " 'which he has spent in jail upon other, distinct, and wholly unrelated charges.' " *Smith*, 309 Kan. at 981, 441 P.3d 1041; *Campbell*, 223 Kan. 528, Syl. ¶ 2, 575 P.2d 524. But the statute does not say that. *State v. Hopkins*, 317 Kan. 652, 655-56, 537 P.3d 845 (2023).

The Kansas Supreme Court recently overruled prior case law by finding that the award of jail credit under K.S.A. 2022 Supp. 21-6615(a) is not limited to time spent "solely" in custody for the charge for which the defendant is being sentenced. See *State v. Hopkins*, 317 Kan. 652, 652, 537 P.3d 845 (2023). Rather, the Court held that a defendant shall be awarded jail time credit for all time spent in custody pending the disposition of his or her case. See *id*. at 657.

State v. Hopkins cont'd.

- Pled to two counts of premeditated murder & sentenced to hard 50
  - At the time of sentencing, there was a MTR probation in a theft case; he also was charged with a new crime relating to his escape from custody
  - As part of his plea deal, the new escape case was dismissed, the State agreed to withdraw MTR and a separate pending case in another county was dismissed
- Spent 572 days in jail awaiting sentencing
  - District Court did not award defendant any jail credit
- KS Supreme Court overruled prior case law and stated that the defendant will be awarded the 572 days of jail credit against his hard 50 sentences
- Prior rule "unworkable"
- The award of credit under K.S.A. 2022 Supp. 21-6615(a) is not limited to time spent "solely" in custody for the charge for which the defendant is being sentenced.

See *State v. Hopkins*, 317 Kan. 652, 652, 537 P.3d 845 (2023).

Cases applying *Hopkins: State v. Breese*

- March 2022 defendant pled guilty to 3 counts
  - He was on postrelease supervision from a 2013 felony case when he committed these crimes.
  - The postrelease board had authority to order the defendant serve a prison sanction but did not take any action against him at time of sentencing
- All parties agree there were 523 days of jail credit
- At sentencing, the district court noted the following:
  - "From 11/06/20 to 04/13/22, defendant [was] also held on a KDOC warrant for a parole violation (13CR4). As this case is consecutive to all others, if defendant receives credit for these dates in 13CR4 then defendant is not eligible for duplicate credit for these dates in 20CR2042."
  - See *State v. Breese*, No. 125,837, 2023 WL 8520792 at *1 (Kan. December 8, 2023)(unpublished opinion).

Cases applying *Hopkins*: *State v. Breese*

- In September 2022, Breese's lawyer filed a motion in the district court asking that the limitation on the jail time credit be removed, so the full 523 days would apply in this case. The motion recited that after Breese was sentenced in this case, the Board ordered him to serve the balance of his postrelease supervision period in the 2013 case as a prison sanction without any reduction based on the 523 days of jail time credit. The motion further recited the Department of Corrections would not apply the credit toward Breese's sentence in this case because of the language in the journal entry and by default would apply the jail time against the revocation of postrelease supervision in the 2013 case. *State v. Breese*, No. 125,837, 2023 WL 8520792 at *1 (Kan. December 8, 2023)(unpublished opinion).
- District court denied the defense motion
- The COA said, "the issue is a narrow legal one: Whether the journal entry properly conditioned the award of jail time credit by noting the award should be reduced by any time credited to another term of incarceration Breese might have to serve in another case.
- Considering the *Hopkins* decision, he should be awarded the 523 days of jail credit in this case because he was detained on them through the sentencing hearing.
- Remanded to the district court with directions to enter an amended journal entry of judgment granting Breese 523 days of jail time credit **without any stated qualifications or limitations.**
- See *State v. Breese*, No. 125,837, 2023 WL 8520792 (Kan. December 8, 2023)(unpublished opinion).

Cases applying *Hopkins: State v. Ward*

- Ward was charged with a new case (18CR2153) while serving probation in (17CR1753)
- Defendant pled and at sentencing, he moved for dispositional departure to probation, which was granted
- Ward was awarded 282 days of jail credit on the previous case (17CR1753), not the current case
- Probation in 18CR2153 later revoked
- Ward argues 17CR1753 had expired before the court awarded jail credit in that case but district court did not make finding so COA didn't either
- Nevertheless, our Supreme Court has recently reconsidered its holding in *Campbell*. And Ward has filed a notice of additional authority, under Supreme Court Rule 6.09(a)(2) (Kan. S. Ct. R. at 40), explaining that the *Campbell* rule limiting jail credit to a defendant of only "credit for the time held in custody solely on account of, or as a direct result of, those charges for which he is now being sentenced" has now been overruled in *State v. Hopkins*, 317 Kan. ___, 2023 WL 6933634, at *4-5 (2023). See *Calderon*, 233 Kan. at 98. *State v. Ward*, No. 125,421, 2023 WL 7404186 at *5 (Kan. App. November 9, 2023)(unpublished opinion).
- Thus, as our Supreme Court pointed out in Hopkins, under the former interpretation of K.S.A. 2022 Supp. 21-6615(a), a court would have had to closely consider each of the other charges against Hopkins to determine how much credit, if any, could be awarded. 2023 WL 6933634, at *5. Nevertheless, if we apply our Supreme Court's recently updated rule in *Hopkins*, we simply conclude that because Ward spent 282 days in jail while his case was pending, Ward must be awarded 282 days of jail credit against his 68 months' imprisonment sentence in his 18CR2153 case. *Id.*
- See *State v. Ward*, No. 125,421, 2023 WL 7404186 at *5 (Kan. App. November 9, 2023)(unpublished opinion).

Cases applying *Hopkins*: *State v. Brown*

- Charged with a crime, served 1 day in jail and then while on pretrial release, charged with a new crime and spent 35 more days in jail
- He pled guilty to the first case and the second case was dismissed pursuant to plea
- District court did not give defendant credit for the 35 days in jail
- "Although it appears Brown was jailed for 35 days due " 'solely' " to his Case 2 charges, this previously distinguishing circumstance no longer matters. See *Hopkins*, 537 P.3d at 850 (abrogating the holding in *State v. Prebble*, 37 Kan. App. 2d 327, 152 P.3d 1245 [2007], where the court found a defendant was entitled to jail time credit because he was jailed "solely" for one case and not pending charges in another county)." *State v. Brown*, No. 125,797, 2023 WL 8521389 at *3 (Kan. App. December 8, 2023)(unpublished opinion).
- "So, instead of determining whether Brown was in jail "solely" due to Case 1 or Case 2, we must now simply conclude that because Brown spent a total of 36 days in jail while Case 1 was pending, he must be awarded 36 days in jail time credit against his sentence. See *Hopkins*, 537 P.3d at 851 (finding the "updated rule is a much easier endeavor; we simply conclude that because Hopkins spent 572 days in jail while his case was pending, Hopkins must be awarded 572 days in jail time credit against his" sentence). For this reason, we must vacate the district court's decision and remand for resentencing." *Id*.

FAQ

How would jail credit calculation be affected if HB 2654 passes?

CRIMINAL THREAT

Criminal History Classification

- The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (2019).
- Then, *Counterman v. Colorado* was decided….

Counterman v. Colorado

- Defendant charged under a Colorado stalking statute
- Counterman moved to dismiss under First Amendment grounds
- "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775, (2023)

Criminal Threat Classification

In *State v. Phipps*, the Kansas Court of Appeals held that *Counterman v. Colorado* effectively overrules *State v. Boettger*. See *State v. Phipps*, 539 P.3d 227, 235. (Kan. App. October 10, 2023). In *Counterman v. Colorado*, the United States Supreme Court found that the First Amendment requires proof of a defendant's subjective understanding of the threatening nature of a statement to be punished as a crime, but a mental state of recklessness is sufficient to establish a true threat. See *id*. The COA found the holding in *Counterman* applies to any pending case in Kansas in which the defendant's sentence is not final. See *id* at 236.

Counterman applied to cases in Kansas: *State v. Phipps*

- Prior conviction of Criminal Threat from 2010
- District Court included conviction in his criminal history after holding a hearing where state presented a transcript of the plea hearing; district court found facts supported both a reckless and intentional threat conviction
- Defendant argues that due to *State v. Boettger,* prior criminal history conviction should not be included, tried to distinguish *Boettger* from *Counterman*, COA rejected his argument
- COA said, "the Kansas Supreme Court had never addressed the question noted that the United States Supreme Court had never explicitly considered whether a conviction for recklessly making a threat can be a true threat or instead violates the First Amendment. But the United States Supreme Court has now explicitly addressed this question in *Counterman*."

DEFERRED ADJUDICATION

Conviction Defined

"Conviction" includes a judgment of guilt entered upon a plea of guilty.

K.S.A 2023 Supp. 21-5111(d)

Deferred Adjudications

Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan. App. 2d 79, 39 P.3d 85 (2002). **However, an entry of a judgment of guilt by the foreign court is necessary to meet Kansas' definition of a conviction**. See *State v. Hankins*, 304 Kan. 226, 372 P. 3d 1124 at 1132 (2016).

In *State v. Hankins*, where a defendant completed Oklahoma's deferred judgment procedure successfully, the Court found that there was no conviction for criminal history purposes because the defendant was discharged from the program without a court adjudication of guilt and a court order to expunge his guilty plea and to dismiss his case without prejudice. See *id*. at 1132.

Additionally, in *State v. Looney*, where the defendant had pled guilty to enter Texas' deferred judgment program and had not finished his probationary period, the Court found that there was no conviction for criminal history purposes because the court never entered a judgment or adjudication of guilt. *State v. Looney*, No. 117,398, 2018 WL 3485727 (Kan.App.2018) (unpublished).

Oklahoma Deferred Judgment

- Defendant had a prior Oklahoma accelerated deferred judgment for domestic assault & battery
- Distinction b/w deferred judgment and accelerated deferred judgment in Oklahoma
- Deferred judgment:
  - Operates similarly to diversion
  - Defers not only a defendant's sentence but also judgment
  - Cannot be included in defendant's criminal history
- Accelerated Deferred Judgment:
  - Occurs when a defendant violates his/her deferred judgment
  - Operates as a judgment of guilt
  - Included in defendant's criminal history

See *State* v. *Waterman*, No. 124,725, 2023 WL 8102827 at *24 (Kan. App. November 22 2023).

Waterman next argues that his accelerated deferred judgment for domestic assault and battery from Oklahoma should not have been included in his criminal history score. He relies on *State v. Hankins*, 304 Kan. 226, 233-39, 372 P.3d 1124 (2016), in support of his argument that the Oklahoma offense is a deferred judgment and cannot be included in his criminal history score. Waterman's reliance on Hankins is misplaced, as it fails to address the difference between a deferred judgment and an accelerated deferred judgment under Oklahoma law. In *Hankins*, the defendant received a deferred judgment, which, as the Kansas Supreme Court explained, operates similarly to diversion and defers not only a defendant's sentence but also judgment. A deferred judgment, similar to a diversion agreement, cannot be included in a defendant's criminal history score. 304 Kan. at 238- 39. Waterman's conviction was not a deferred judgment, it was an accelerated deferred judgment under Okla. Stat. Ann. § 991c(G), which operates as a judgment of guilt. The statute provides: "Upon any violation of the deferred judgment, other than a technical violation, the court may enter a judgment of guilt . . . ." Okla. Stat. Ann. § 991c(G). Thus, it appears that Waterman violated the conditions of his deferred judgment and received an accelerated deferred judgment—that is, a conviction/judgment of guilt. As a result, the Oklahoma conviction was properly included in his criminal history score. *State v. Waterman*, No. 124,725, 2023 WL 8102827 at *24 (Kan. App. November 22 2023).

RESTITUTION

Restitution Unworkability

K.S.A. 2023 Supp. 21-6604(b)(1) states: (b) (1) In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (***B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part.*** In regard to a violation of K.S.A. 21-6107, and amendments thereto, such damage or loss shall include, but not be limited to, attorney fees and costs incurred to repair the credit history or rating of the person whose personal identification documents were obtained and used in violation of such section, and to satisfy a debt, lien or other obligation incurred by the person whose personal identification documents were obtained and used in violation of such section. In regard to a violation of K.S.A. 21-5801, 21-5807, 21-5813 or 21-5818, and amendments thereto, such damage or loss shall include the cost of repair or replacement of the property that was damaged, the reasonable cost of any loss of production, crops and livestock, reasonable labor costs of any kind, reasonable material costs of any kind and any reasonable costs that are attributed to equipment that is used to abate or repair the damage to the property. If the court finds restitution unworkable, either in whole or in part, the court shall state on the record in detail the reasons therefor.

In a case where the defendant was ordered to pay restitution despite being sentenced to a lengthy prison term, the Court of Appeals found the defendant failed to meet his burden that the order was unworkable because the defendant did not show more than a lengthy prison sentence and uncertain future earnings. See *State v. McKinzy*, No. 125,048, 2023 WL 4983123 at *2 (Kan. App. August 4, 2023) (unpublished opinion)

Restitution Workability

- Defendant pled guilty to second degree murder
- Sentenced to 438 months (36.5 years) imprisonment and ordered to pay $5000 in restitution
- District Court found that the defendant was doing well while taking mental health medication and he should be able to pay restitution while in prison and on postrelease
- Defense counsel presented evidence mostly about defendant's mental health history
- Restitution is the rule and not the exception
- Burden is on the defendant to show unworkability
- The burden to prove unworkability was with McKinzy. He offers no evidence to support his claim of unemployability either during or after incarceration other than his allegations of mental health issues. But the court considered this claim and found those issues were addressed with medication. Given that McKinzy himself noted that medication helps him, we cannot say the court's conclusion was unreasonable.

See *State v. McKinzy*, No. 125,048, 2023 WL 4983123 at *2 (Kan. App. August 4, 2023) (unpublished opinion).

DEPARTURES

Departures

- Defendant pled to Possession of MJ with intent to distribute
- Presumptive prison; defendant had no prior criminal history
- Defendant's motion to depart to probation was granted
- State appealed arguing no substantial & compelling reasons to depart
- Where a district court granted a departure motion based solely on a defendant's age and lack of criminal history, the Court of Appeals affirmed the decision when it held that a reasonable person could find age and lack of criminal history as reasons to depart from the statute. See *State v. Adams*, No. 125,383, 2023 WL 4832237 at *3 (Kan. App. July 28, 2023) (unpublished opinion).

OUT OF STATE CONVICTIONS: PRESENCE OF ANOTHER PERSON

Presence of Another Person

"the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;"

K.S.A. 2023 Supp. 21-6811(e)(3)(B)(i)(d)

State v. Shaffer

The Court of Appeals recently affirmed a district court's ruling that a Missouri conviction of resisting arrest was a person felony under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(d) because the elements of Missouri's resisting arrest statute require the presence of another person—the arresting officer—therefore, under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(i)(d), the Missouri conviction for resisting arrest is a person felony despite any additional illegal conduct that may have preceded it. See *State v. Shaffer*, No. 125,452, 2023 WL 5163294 at *4 (Kan. App. August 11, 2023) (unpublished opinion).

State v. Chappell

- 2 prior Oklahoma eluding a police officer convictions classified as person felonies
- Defendant argues that the "presence of another person" language in the statute does not include the presence of a police officer
- COA followed *Baker* and found that the prior Oklahoma convictions of eluding a police officer should be scored as person felonies. See *State v. Chappell*, No. 125,549, 2023 WL 7404605 at *4 (Kan. App. November 9, 2023)(unpublished opinion).

PROBATION REVOCATION

State v. Inchaurigo

- On probation for 2 cases which were his 7th and 8th DUI convictions
- First Violation hearing
  - Allegations that he failed to report to community corrections, admitted to drinking alcohol and failed to contact his ISO
  - Parties agreed to 60-day jail sanction followed by 90 days of electronic alcohol monitoring
  - Defendant was released early from the 60-day jail sanction to go to inpatient treatment
- Second violation hearing one month later
  - Allegations that he failed to report to community corrections for random UA, a day later he had a BAC of .327 and admitted to drinking alcohol
  - State asked for revocation and defense asked for another 60-day jail sanction
  - Defendant's probation was revoked
  - District court noted that it was worried defendant would kill somebody and said he didn't know anything else that would work

See *State v. Inchaurigo*, Nos. 125,329, 125,330, 2023 WL 8295259 (Kan. App. December 1, 2023)(unpublished opinion).

- The parties agree that the 60-day jail sanction at the first hearing was not appropriate (should have given 2-3-day sanction first)
  - 60-day sanction was not permitted for people serving probation for felony DUI
    - If the original crime of conviction was a felony, except for violations of K.S.A. 8-1567 or 8-2,144, and amendments thereto, and the court makes a finding that the offender has committed one or more violations of the release conditions of the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction, the court may impose confinement in a county jail not to exceed 60 days upon each such finding. Such confinement is separate and distinct from the violation sanctions provided in subsection (c)(1) and shall not be imposed at the same time as any such violation sanction. K.S.A. 2023 Supp. 22-3716(c)(9).
- Main issue on appeal is if the district court could revoke without imposing 2-3-day sanction
  - State argued that the public safety exception applies here
  - COA found that the district court did not make particularized findings but instead made general statements about his experience in serving on the bench and experience with DUI cases. The judge expressed concern that someday a repeat DUI offender on probation was going to kill someone. And the judge indicated that, in his experience, many people did not successfully complete treatment for alcohol abuse. But the judge did not specifically reference public safety or Inchaurigo's welfare or analyze whether either would be served by imposing an intermediate sanction in Inchaurigo's case.
- Case remanded for new dispositional hearing.

See State v. Inchaurigo, Nos. 125,329, 125,330, 2023 WL 8295259 (Kan. App. December 1, 2023)(unpublished opinion).

PROBATION REVOCATION CONT'D.

Sentenced to probation in current case

- After he was sentenced, he was detained in a different county for a separate case
- Before he was released, the state moved to revoke his probation for failure to report and failure to pay costs and restitution

At sentencing, defendant not directed to report to probation or pay while he was incarcerated. Nonetheless, district court revoked probation

District court lacked substantial competent evidence in its decision to revoke

See *State v. Romero Jr.*, No. 125,281, 2024 WL 504066 (Kan. App. February 9, 2024)(unpublished opinion).

State v. Romero Jr. Cont'd.

"At sentencing, the district court ordered Romero's probation to begin immediately and stated that he would be released from jail that afternoon. The prosecutor then noted to the court that there may be a "hold" on Romero due to the pending charges in Sedgwick County and that "if he does [have a hold], he's gonna have to go back to Sedgwick County" Jail. The court then explained to Romero that it would have a court services officer (CSO) "come up and visit with you now, and give you a date and time to come up and report on probation. Now, if you're in custody on that date, you need to make sure that gets communicated over here. Otherwise, it will show up as a failure to report." Romero replied, "Okay." *State v. Romero Jr.*, No. 125,281, 2024 WL 504066 at *1(Kan. App. February 9, 2024)(unpublished opinion).

- Ordered to report as directed
- No evidence that CSO spoke to or contacted defendant after sentencing hearing
- Defendant's wife called CSO and told CSO defendant was in custody; CSO told wife that defendant needed to contact them upon release

State v. Romero Jr. Cont'd.

"At the time of Romero's sentencing, the district court knew he was likely to be detained in a separate matter and directed Romero to report to the CSO for his probation after his release from custody in that separate case. The CSO knew he was incarcerated, and Romero followed directions to have his family keep the CSO notified of his continued incarceration. Despite the clear directions to report after his release from custody, the State sought to revoke Romero's probation prior to his release from custody—the condition precedent to the terms and conditions of his probation. Romero had no instructions to report or make restitution payments while incarcerated in the separate case. The district court abused its discretion in revoking and reinstating Romero's probation because it lacked substantial competent evidence supporting the allegations that Romero violated the terms and conditions of his probation.

The district court's revocation and reinstatement is reversed and remanded with directions to reinstate Romero's original probation, determine if Romero has completed the terms and conditions of the original probation, and enter any further orders that may be necessary and consistent with this opinion." *Id*. at *7.

DUI SENTENCING

State v. Kihega

- Plea agreement indicated defendant was pleading to a third DUI offense even though he was actually charged in the same case with a fourth DUI.
- Court sentenced defendant to fourth or subsequent DUI despite plea after criminal history came back showing this was defendant's 6th DUI
- Defendant appeals saying sentence is illegal
- COA found, "Kihega's sentence is not illegal because K.S.A. 2020 Supp. 8-1567(n) prohibits parties from negotiating a plea that avoids mandatory penalties for prior DUI convictions and the district court properly sentenced him based on the accurate, applicable number of prior DUI convictions reflected in his criminal history." *State v. Kihega*, No. 125,993, 2024 WL 397371 at *1 (Kan. App. February 2, 2024)(unpublished opinion).
- Defendants cannot avoid statutory penalties through plea bargaining!

QUESTIONS?

KSSC RESOURCES

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