No. 06-96742-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLEE,

v.

HARLAN McINTIRE, DEFENDANT-APPELLANT

BRIEF OF APPELLANT HARLAN McINTIRE

APPEAL FROM THE DISTRICT COURT OF KINGMAN COUNTY
JUDGE LARRY T. SOLOMON
DISTRICT COURT CASE NO. 05-CR-113

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ARGUMENT: The trial court violated Defendant's right to due process by illegally imposing upon him two (2) consecutive standard severity level 1 sentences when he was charged, bound over, arraigned and found guilty by a jury of two (2) severity level 2 felonies, and Defendant's case must be remanded for re-sentencing. 4

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STATEMENT OF THE CASE

Defendant Harlan McIntire appeals from his conviction of two counts of Rape, contrary to K.S.A. 21-3502(a)(2).

STATEMENT OF ISSUES

Whether a defendant lawfully may receive two (2) consecutive standard severity level 1 sentences when he was charged, bound over, arraigned and found guilty by a jury of two (2) severity level 2 felonies.

STATEMENT OF FACTS

On August 1, 2005, the State of Kansas filed a Complaint/Information charging Defendant with two (2) violations of K.S.A. 21-3502(a)(2) regarding two (2) separate events that occurred in July and October 2003; the Complaint/Information notified Defendant that he was charged with crimes that were severity level 2 person felonies. (R. I, 9-10.) Defendant made his first appearance on August 8, 2005, when he was given a Kansas Sentencing Guideline Grid with the appropriate severity levels highlighted, and was bound over for trial on September 21, 2005, again on two (2) severity level 2 person felonies. (R. I, 11-14.)

On October 7, 2005, Defendant appeared before the trial court for arraignment. (R. I, 15-16; R. XII, 1-8.) Interestingly, the trial court inquired about the appropriate severity level:

THE COURT: All right. Mr. McIntire, your attorney's just announced you want to waive a formal reading of the complaint and enter a plea of not guilty today. You understand the two charges that you are faced with, sir?

THE DEFENDANT: Yes.

THE COURT: And you understand the penalties that attach to those two charges, which are both rape charges? And there's been an interlineation on the Complaint, is it Severity Level 1 or Severity Level 2 charges, Counsel?

[PROSECUTOR]: Which have they been changed to?

THE COURT: Well, count – I'm sorry –

[PROSECUTOR]: I believe – I believe they're 2s, Your Honor, as a result of when they took place.

THE COURT: Okay.

[DEFENSE COUNSEL]: Yeah, 2003.

THE COURT: Yeah, the date of the alleged offenses are in July of '03, and they have been penned in as Severity Level 2s rather than Severity Level 1s. You have gone over the severity level of the rape charges as it was under Kansas law in July of 2003, sir?

THE DEFENDANT: Uh-huh.

[DEFENSE COUNSEL]: Yes, we've had a sentencing guidelines worksheet.

THE COURT: Okay. You need to answer out loud, please.

THE DEFENDANT: Yes.

THE COURT: So then is it your desire to go ahead and waive formal arraignment and reading of the complaint at this time?

THE DEFENDANT: Yes.

(R. XII, 2-3.) The corresponding Journal Entry reflects Defendant's arraignment on two (2) severity level 2 person felonies. (R. I, 15.)

No oral motion or amendment to the Complaint was made during the Motion in Limine Hearing on January 17, 2006. (R. IV, 1-15.) No hearing was held on the record on February 3, 2006; instead, the matters at issue were resolved by agreed journal entry. (R. I, 2-3, 32-33.) No oral motion or amendment to the Complaint was made during Jury Trial on February 21 and 22, 2006. (R. V, 1-105; R. VI, 1-65; R. XIII, 1-75.) On February 22, 2006, Defendant was found guilty by a jury of two (2) severity level 2 person felonies. (R. I, 50, 59-60.)

After the jury announced its verdict and left the courtroom, the trial judge did find Defendant guilty of one "severity level 1 person felony," as well as a second count. (R. VI, 59.) Appellate counsel has been unable to find – nor has trial counsel been able direct counsel to – any reference in the record where Defendant was advised, in person, prior to verdict, that he had been misinformed regarding the severity level of the offenses charged.

On March 22, 2006, the trial court entered orders "Nunc Pro Tunc" increasing the crimes of which Defendant was charged, bound over, arraigned and found guilty to severity level 1 person felonies. (R. I, 73-75.) No hearing during which Defendant was present was held between February 22 and April 7, 2006. (R. I, 3-4.)

On April 7, 2006, Defendant received two consecutive standard severity level 1 sentences as a criminal history "H." (R. I, 87-94.)

Defendant timely filed his Notice of Appeal. (R. I, 84.)

STANDARD OF REVIEW

Interpretation of a statute involves a question of law, and an appellate court's review is unlimited. *State v. Masterson*, 261 Kan. 158, 161, 929 P.2d 127, 129 (1996). Moreover, an appellate court also has unlimited review over the questions of law of what process is due in a given case and the determination whether a criminal sentence is illegal. *State v. Moody*, ___ Kan. ___, 144 P.3d 612 (No. 92,248 10/27/2006) (citing *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1 (2000); *State v. Huff*, 277 Kan. 195, 199, 83 P.3d 206 (2004)).

ARGUMENT

The trial court violated Defendant's right to due process by illegally imposing upon him two (2) consecutive standard severity level 1 sentences when he was charged, bound over, arraigned and found guilty by a jury of two (2) severity level 2 felonies, and Defendant's case must be remanded for re-sentencing.

In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation. U.S. CONST. amend. VI. The Sixth Amendment and the due process clause of the Fourteenth Amendment require that an indictment or information be drawn with sufficient clearness and completeness to show a violation of law, to enable the accused to know the nature and cause of the charge against him and to enable him to make out his defense. U.S. CONST. amend. XIV; *Carter v. United States*, 173 F.2d 684 (10th Cir.

1949), *cert. den.* 337 U.S. 946, 69 S.Ct. 1503, 93 L.Ed. 1749 (1949). Similarly, in all prosecutions, the accused shall be allowed to demand the nature and cause of the accusation against him. K.S.A. CONST. Bill of Rights § 10. Section 10 and the Sixth Amendment are identical in scope and, therefore, are subject to identical interpretation. See *State v. Morris*, 255 Kan. 964, 979, 880 P.2d 1244, 1255 (1994).

The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *State v. Wilkinson*, 269 Kan. 603, Syl. ¶ 2, 9 P.3d 1 (2000). A defendant is denied due process under the Fourteenth Amendment if he is convicted of an offense not charged in the information. *State v. Minor*, 197 Kan. 296, 416 P.2d 724 (1966). Conversely, a defendant receives proper due process notice, required by the Sixth and Fourteenth Amendments and Section 10, if he has been "specifically advised by the information of the specific offense with which he was charged and the seriousness thereof, *including the class of felony of which he stood accused*." *State v. Loudermilk*, 221 Kan. 157, 159, 557 P.2d 1229, 1232 (1976) (emphasis added). "*Loudermilk* clearly indicates it is proper to allege the severity level of the crime charged in an indictment." *State v. Crank*, 262 Kan. 449, 458, 939 P.2d 890, 896 (1997).

K.S.A. 22-3201 implements these constitutional protections. *State v. Hall*, 246 Kan. 728, 754, 793 P.2d 737, 756 (1990). K.S.A. 22-3201(c) provides that, when relevant, the complaint, information or indictment shall also allege facts sufficient to constitute a crime or specific crime subcategory in the crime seriousness scale. Criminal statutes are to be strictly construed against the State. *State v. Masterson*, 261 Kan. 158, 929 P.2d 127 (1996). In *Masterson*, the Kansas Supreme Court rejected the State of Kansas' argument that there

was no statutory requirement in K.S.A. 22-3201, or otherwise, to give a defendant formal notice of the severity level of the offense being charged because it was important only at the time of sentencing, holding instead that a defendant may not be sentenced for a higher severity level offense than that he was charged with and convicted of. "[A defendant] should have the right to know before trial the severity level of the crime being charged." *Masterson*, 261 Kan. at 164, 929 P.2d at 130. "The [*Masterson*] court held that, as a matter of notice, the complaint/information must specifically allege the severity level of the offense being charged ... ." *State v. Elliott*, 281 Kan. 583, ___ P.3d ___ (2006). Under such circumstances, the defendant's conviction is not rendered void, but his sentence is restricted to that appropriate for the lower severity level. *State v. Larson*, 265 Kan. 160, 958 P.2d 1154 (1998).

In Kansas, due process requires that a defendant be informed of not only the specific sentencing guidelines level of the crime but also the maximum penalty that may be imposed. *State v. Reed*, 248 Kan. 506, 508, 809 P.2d 553 (1991) (acceptance of guilty plea). Thus, although the crime classification remains the same – a nonperson felony – a defendant must be notified if he is charged as a fourth or subsequent offender due to the disparate penalties involved; failure to provide such notice results in the defendant being sentenced as a third-time offender. *State v. Moore*, 35 Kan.App.2d 274, 129 P.3d 630 (2006) (sentence vacated and remanded with directions). Conversely, where a defendant receives notice in the complaint of the severity level of the offense charged and is informed at a plea hearing of the maximum penalty for a fourth offense, the defendant has been afforded due process and is appropriately sentenced as a fourth-time offender. *State v. Moody*, ___ Kan. ___, 144

P.3d 612 (No. 92,248 10/27/2006). Here, the sentence of 331 months imposed upon Defendant, a criminal history "H," exceeds the statutory maximum for a severity level 2 offense, the maximum the State notified Defendant that he could receive, and thus, is illegal. *State v. Lofton*, 272 Kan. 216, 217, 32 P.3d 711, 712 (2001).

Undoubtedly, the State of Kansas will argue that any errors made were corrected by the orders "Nunc Pro Tunc" filed on March 22, 2006. A nunc pro tunc order is designed to make the court's records speak the truth and to record that which was actually done, but not recorded. See BLACK'S LAW DICTIONARY 1069 (6th ed. 1990). The function of a nunc pro tunc order is not to make an order now for then, but to enter now for then an order previously made. *French v. French*, 171 Kan. 76, 82, 229 P.2d 1014 (1951). The power of the court is limited to making the journal entry speak the truth by correcting clerical errors arising from oversight or omission and it does not extend beyond that function:

> A nunc pro tunc order may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission, or an affirmative action which should have been, but was not, taken by the court, or to show what the court should have decided, or intended to decide, as distinguished from what it actually did decide.

Book v. Everitt Lumber Co., Inc., 218 Kan. 121, 125, 542 P.2d 669, 673 (1975) (citing *Wallace v. Wallace*, 214 Kan. 344, 520 P.2d 1221 (1974)). An order nunc pro tunc that alters a judgment actually rendered is invalid. *Production Credit Ass'n of South Central Kansas v. Mater*, 27 Kan.App.2d 700, 703-04, 8 P.3d 1274, 1277-78, *rev. denied* 270 Kan. ___ (2000). Any correction of a crime severity level persisting back to the filing of a complaint or indictment impacts a defendant's fundamental due process rights cannot be characterized as a "mere clerical error." Instead, the proper procedure was for the State to amend the

Complaint before verdict or finding as permitted by K.S.A. 22-3201(e). The State could have attempted to do this orally and formalized it later, so long as Defendant and counsel were present and permission was obtained from the judge. *State v. Williams*, 268 Kan. 1, Syl. ¶ 4 & 14, 988 P.2d 722 (1999) (citing *State v. Rasch*, 243 Kan. 495, 758 P.2d 214 (1988)). Trial counsel indicates this never occurred, and after verdict any such amendment was untimely.

Defendant is unsure why the legal professionals involved – prosecutor, defense counsel and district court judge – all believed offenses committed in 2003 to be severity level 2 felonies rather than severity level 1s, as classified by K.S.A. 21-3502(c) which remained unchanged from 1996 to 2006. Ultimately, the State of Kansas charged Defendant with two (2) severity level 2 felonies, which it failed to investigate and correct once questioned by the court, and Defendant was convicted by a jury of two (2) severity level 2 felonies. The State knowingly chose to charge Defendant with lesser offenses under the law as it then existed. The mistake was not Defendant's, and due process requires that he be sentenced to no higher term than the State notified him that he could receive.

CONCLUSION

The trial court illegally imposed upon Defendant two (2) consecutive standard severity level 1 sentences when he was charged, bound over, arraigned and found guilty by a jury of two (2) severity level 2 felonies. Defendant's sentence must be vacated and his case remanded with instructions that he receive a severity level 2 sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this ____ day of March, 2007, two (2) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to: Bradford L. Williams, Kingman County Attorney, 227 N. Main, P.O. Box 454, Kingman KS 67068; with a courtesy copy to: Paul Morrison, ATTORNEY GENERAL, 120 S.W. 10th Ave., Topeka, KS 66612-1597.

ATTORNEY FOR APPELLANT