

For Opinion See 151 P.3d 864

Court of Appeals of Kansas.  
State of Kansas, Plaintiff-Appellee,  
v.  
Previn TAUER, Defendant-Appellant.  
No. 05-95152-A.  
July 12, 2006.

Appeal from the District Court of Sedgwick County, Kansas The Honorable Rebecca Pilshaw, District Judge  
District Court Case Number 94 CR 684

### Brief of Appellee

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#### STATEMENT OF THE ISSUE

I. Did the district court abuse its discretion in summarily denying defendant's motion to correct illegal sentence without holding an evidentiary hearing or appointing counsel?

#### STATEMENT OF THE FACTS

On March 15, 1994, a group of students from Southeast High School gathered at Boston Park in Wichita to watch Eric Siroky and Brent Mannas engage in a fist fight. (R. II, 51-52, 68, 71-72, 82-83.) No weapons were to be used in the fight. (R. II, 36.) \*2 A crowd of between 40 and 100 people gathered. (R. II, 32, 52.)

Previn Tauer was a friend of Brent Mannas. (R. II, 71.) Tauer went to the park with several youths, including Jason Perez and Chris Abila. (R. II, 71.) According to Abila, Tauer went to the park armed with a .22. (R. II, 185-86.)

After Siroky and Mannas stopped fighting, Jason Perez and Ramon Robertson started to fight. (R. II, 54.) While Perez was on the ground, Tyrone Sims kicked Perez. (R. II, 19, 24.) Tauer pulled a gun out of his coat and started shooting randomly into the crowd, sweeping his hand from left to right as he fired. (R. II, 41, 42, 55-56, 73, 76, 87, 129, 132, 185-89, 191, 192.) In the words of one witness, Tauer "just pulled the gun and just started shooting at everyone, and he looked like he thought it was funny and he didn't care who he shot. He just had a smile on his face like he was laughing." (R. II, 55.)

The crowd scattered. (R. II, 87.) According to one witness, "everybody was scared from running and seeing Previn shooting." (R. II, 87.) Tony Sims was shot in the jaw. (R. II, 25.) Will Sullivan was shot through the hand and in the arm. (R. II, 103, 166-68.) According to Sullivan, Tauer simply looked at him and started shooting. (R. II, 99.) Tyrone Sims was shot in the back as he ran toward a parked car. (R. II, 26, 28, 178.) The bullet traveled through Sims' body resting right above his collar bone. (R. II, 178.) Sims, 15 years old, died. (R. II, 20, 177.) "Death was attributed to a gunshot wound to the chest and abdomen." (R. II, 178.)

Tauer was charged with intentional second-degree murder, a severity level one \*3 person felony, and aggravated battery based on intentionally causing great bodily harm or disfigurement to Sullivan, a severity level four person felony. (R. I, 33-34.) Defendant was convicted as charged. (R. II, 215.)

The State filed a motion for upward durational departure at sentencing, listing the following in support:

"1. The potential of more deaths and injuries created by the defendant shooting intentionally and purposefully into a crowd of 40 to 100 people;

"2. The youthful age of all those exposed to the potential of death and injury by the defendant's actions;

"3. The youthful age of the victim, Tyrone Sims, who was killed at age [15] for no reason except the intentional and obvious disregard for human life exhibited by the defendant;

"4. The youthful age of William Sullivan, who was shot at least twice and whose jacket exhibited signs of being grazed by a bullet or bullets;

"5. The youthful age and seriousness of the injury to Tony Sims, who was not charged [as] a victim, but whose injury could have caused his death had he been hit a fraction of an inch differently in any direction;

"6. The obvious disregard for the sanctity of human life exhibited by the defendant as shown by his laughter when shooting into the large crowd of teenagers;

"7. The defendant's gang affiliation with the Insane Crips, along with his affinity for carrying guns." (R. I, 61-62.)

\*4 Defendant filed a motion for downward durational departure, noting his age, 16, and that his prior history of one person felony placed him in gridbox D. (R. I, 59-60.) Defendant alleged that at "the time of his plea bargaining agreement in New Mexico, Defendant was not aware of the consequences in future proceedings on possible sentences." (R. I, 59.) Defendant asked that he be treated as if he fell within gridbox I. (R.I, 60.)

At sentencing, the prosecutor asked the court to consider defendant's statement to law enforcement officers concerning his gang affiliation. (R. III, 7.) The court commented that it "could recall that evidence very clearly." (R. III, 7.) The court denied defendant's motion for downward departure, stating, "I believe many people are in this situation that [the defendant] finds himself in that they have entered into pleas before these sentencing guidelines took effect. No one knew what effects those pleas were going to have. I don't think he's in any different situation than anyone else, and I will overrule that motion." (R. III, 5.)

The court granted the State's motion for upward departure, doubled his presumptive sentences on both convictions and ran them consecutively, for a total term of 416 months. (R. III, 18.) In support of its sentence, the court noted the following: (1) defendant's "callous and heinous disregard for the beauty of human life"; (2) defendant fired into a crowd not caring who he hit; (3) the potential that existed for other murders and (4) defendant's concern for only himself. (R. III, 18-20.) The court specifically found defendant's "conduct during the commission of these offenses \*5 manifested excessive brutality to the victims in a manner not normally present in these offenses," and it adopted all seven grounds raised by the State in its motion to depart. (R. III, 20, 22.)

Defendant filed a timely notice of appeal, which stated, "Notice is hereby given that Previn E. Tauer appeals from the finding of murder in the second degree and aggravated battery to the Court of Appeals of the State of Kansas." (R. II, 89.)

Defendant's brief on direct appeal, however, attempted to expand this court's jurisdiction by briefing issues regarding defendant's sentence. (R. I,82-84.) This court ruled, "We do not have jurisdiction to consider defendant's appeal of his sentences.... We only obtain jurisdiction over rulings identified in the notice of appeal. [Citation omitted.] In the present case, there is simply no room to broadly construe defendant's notice of appeal to include sentencing issues." (R. I, 83.) This court dismissed the portion of defendant's appeal raising issues related to his sentence and otherwise affirmed defendant's convictions. (R. I, 83.)

Nearly four years later, defendant filed a motion pursuant to K.S.A. 60-1507 with the district court in Sedgwick

County case number 00 C 1373.<sup>[FN1]</sup> In this motion, defendant sought review of his sentence and made an allegation of ineffective assistance of counsel. The district court summarily denied defendant's motion and he \*6 appealed the decision.<sup>[FN2]</sup>

FN1. The Appellee has filed a request pursuant to Supreme Court Rule 3.02, requesting defendant's motion pursuant to K. S.A. 60-1507 filed in Sedgwick County case number 00 C 1373 be added to the record on appeal.

FN2. The Appellee has filed a request pursuant to Supreme Court Rule 3.02, requesting the district court's order denying defendant's motion pursuant to K.S.A. 60-1507 in Sedgwick County case number 00 C 1373 be added to the record on appeal.

In reviewing the appeal, this court noted a previous panel of the court had incorrectly concluded it was without jurisdiction to review the sentencing errors alleged in defendant's direct appeal. This court further noted, however, that defendant was not denied a direct appeal and the sentencing issue was identified in the brief. This court then determined that prejudice would not be presumed and the perceived error by the court in defendant's direct appeal would not be revisited. The court further found the sentencing court did not err in imposing a departure sentence and accordingly defendant's trial attorney's performance was not ineffective for failing to perfect a sentencing appeal. This court then affirmed the district court's summary denial of defendant's K.S.A. 60-1507 motion.<sup>[FN3]</sup>

FN3. The Appellee has filed a request pursuant to Supreme Court Rule 3.02, requesting the Court of Appeals opinion affirming the district court's denial of defendant's motion pursuant to K.S.A. 60-1507 be added to the record on appeal.

Over three years later, defendant filed the current motion to correct illegal sentence in his criminal case. (R. I, 85-92.) In his motion, defendant yet again challenged the upward departure granted by the district court in addition to raising a new issue alleging the district court erred in ordering him to pay restitution to Tony Sims. (R. I, 85-92.) The district court reviewed the motion and summarily denied the same without holding a hearing or appointing counsel. (R. I, 103-07.)

\*7 Defendant then timely appealed. (R. I, 109.)

#### ARGUMENTS AND AUTHORITIES

- I. The district court did not abuse its discretion in summarily denying defendant's motion to correct illegal sentence without holding an evidentiary hearing or appointing counsel.

##### Standard of Review

The decision of whether to grant relief, hold a hearing, and/or appoint counsel with respect to a pro se post-trial motion is within the sound discretion of the trial court. See *State v. Kirby*, 272 Kan. 1170, 1193, 39 P.3d 1 (2002).

Of this standard of review, it has been said, "This is an extraordinarily high standard." *State v. Downey*, 27 Kan. App. 2d 350, 357, 2 P.3d 191 (2000). "One seeking to establish an abuse of discretion assumes a heavy burden for '[i]f reasonable men could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion.'" [Citations omitted.] *State v. Brown*, 4 Kan. App. 2d 729, 733, 619

P.2d 655 (1980).

#### Discussion

K.S.A. 22-3504(1) states that “the defendant shall have the 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.” An illegal sentence, however, has been defined as “a sentence imposed by a court without jurisdiction, a sentence which does not conform to the statutory provision, either in \*8 character or the term of punishment authorized, or a sentence which is ambiguous with respect to the time and manner in which it is to be served. [Citations omitted.]” *State v. Duke*, 263 Kan. 293, 194, 946 P.2d 1375 (1997).

Defendant's claim appointment of counsel and an evidentiary hearing on his pro se motion to correct illegal sentence was required as a matter of course has been rejected by our Supreme Court. See *Duke*, 263 Kan. at 195-96. Instead, appointment of counsel and an evidentiary hearing are required only when a preliminary examination of the motion reveals a substantial question of fact or law. See *Duke*, 263 Kan. at 195-96.

Here, defendant's motion before the district court did not present a substantial question of fact or law, and, therefore, was properly summarily denied without appointment of counsel or an evidentiary hearing. The motion once again merely rehashed defendant's arguments regarding the district court's decision to grant the State's request for an upward departure. Specifically, defendant's motion alleges the district court erred in finding the offenses manifested excessive brutality, as it denied defendant the opportunity to respond, and that the district court's findings were not supported by substantial competent evidence.

On direct appeal, defendant first challenged the district court's findings in imposing an upward departure sentence. This court refused to address the sentencing issues, however, as defendant's notice of appeal only addressed his conviction. (R. I, 83.) In his K.S.A. 60-1507 motion, defendant raised the same issue in the context of \*9 a claim of ineffective assistance of counsel; specifically his trial counsel's failure to include his sentence in the notice of appeal in movant's direct appeal.

In addressing the ineffective assistance of counsel claim, this court analyzed whether the sentencing court erred in imposing an upward sentencing departure. This court held defendant was given sufficient notice as to the factor of excessive brutality and that the district court's findings in imposing the upward departure were supported by substantial evidence. *Tauer v. State*, No. 85,712, unpublished opinion filed November 30, 2001.

Clearly, with the exception of the restitution issue also raised in his motion to correct illegal sentence, defendant's motion raises the same issue advanced in his direct appeal and in his K.S.A. 60-1507 proceedings. Moreover, the issue regarding restitution could have been brought in his direct appeal. Where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is *res judicata* as to all issues raised and those issues that could have been presented, but were not, are deemed waived. *State v. Neer*, 247 Kan. 137, 795 P.2d 362 (1990). A motion to correct an illegal sentence “may not be used as a vehicle to breathe new life into appellate issues previously abandoned or adversely determined.” *State v. Johnson*, 269 Kan. 594, 602, 7 P.3d 294 (2000).

As previously discussed, this court has already expressly rejected defendant's claim that district court erred in finding the offenses manifested excessive brutality, as it denied defendant the opportunity to respond, and that the district court's findings \*10 were not supported by substantial competent evidence. *Tauer v. State*, No. 85,712, unpublished opinion filed November 30, 2001. Accordingly, pursuant to *Neer*, this court should not re-

litigate those issues. Further, by neglecting to raise the restitution issue on direct appeal, movant has waived the issue and is attempting to use the current motion to breath new life into appellate issues previously abandoned. Under these circumstances, defendant's sentencing error claims cannot not provide him relief and the trial court was correct in summarily denying the motion.

For these reasons, the decisions of the trial court should be affirmed.

#### CONCLUSION

The district court did not abuse its discretion in summarily denying defendant's motion to correct illegal sentence without holding an evidentiary hearing or appointing counsel.

State of Kansas, Plaintiff-Appellee, v. Previn TAUER, Defendant-Appellant.  
2006 WL 2381637 (Kan.App. ) (Appellate Brief )

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