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DEC 10 2013  
CAROL G. GREEN  
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No. 13-109688-A

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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STATE OF KANSAS  
Plaintiff-Appellee

v.

MATHEW SCOTT EVERTSON  
Defendant-Appellant

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BRIEF OF APPELLEE

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APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
HONORABLE RICHARD ANDERSON, JUDGE  
DISTRICT COURT CASE NO. 07-CR-1461

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## NATURE OF THE CASE

Matthew Evertson (Evertson) appeals the revocation of his diversion agreement and his sentence.

## STATEMENT OF THE ISSUES

- I. **The district court did not violate Evertson's due process rights when it revoked his diversion agreement.**
  
- II. **The district court did not violate Evertson's Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey* when it used Evertson's prior juvenile adjudication to increase his sentence without requiring the State to prove them beyond a reasonable doubt.**

## STATEMENT OF THE FACTS

On July 24, 2007, Evertson was charged with one count of criminal damage to property and one count of criminal trespass. (R. I, 11-14.) Evertson entered into an agreement for a pretrial diversion with the State on March 4, 2009. (R. I, 72-77.) In that agreement the district attorney agreed to defer the prosecution of the case for 60 months if Evertson abided by the terms and conditions of the diversion agreement. (R. I, 72-73.)

Evertson agreed that if he violated any conditions of the agreement, the district attorney could revoke or modify the conditions of the diversion agreement, change the period of deferred prosecution, or revoke the agreement and ask the district court to reinstate the case on the docket for further prosecution. (R. I, 73.) In addition to the eight "Standard Conditions" of the diversion agreement, there were two "special conditions." (R. I, 74.) Those "Special Conditions" stated:

2.1 You shall make restitution in the amount of \$10,000.00, payable to Clerk of the District Court. Payments are to be as follows: First payment in the amount of \$167.00, due by the 10<sup>th</sup> day of May 2009; monthly payments in the amount of \$167.00 due thereafter on the 10<sup>th</sup> of the month until paid in full. (The total must be paid in full before the expiration of the Diversion.)

2.2 If you are paying Restitution in monthly payments, you shall pay a Restitution monitoring fee to the District Attorney's Office of \$65.00 at the time of signing the Diversion Agreement. (R. I, 74.)

Evertson initialed by each of those "Special Conditions." (R. I, 74.) The diversion agreement also contained a section entitled "Waiver of Rights." (R. I, 75-76.) Evertson waived his right to a preliminary hearing and speedy trial. (R. I, 75.) Evertson also agreed that if the diversion agreement was subsequently revoked, he would proceed to a trial on stipulated facts. (R. I, 76.) Evertson signed the diversion agreement indicating that he understood the agreement and its terms and conditions. (R. I, 76-77.)

Over two years later, on March 25, 2011, the State moved to revoke Evertson's diversion agreement. (R. I, 79-80.) The State alleged that Evertson failed to pay costs associated with the case. "In sections 1.5, 1.6, and 2.1 of the Diversion Agreement, the defendant signed and agreed to pay court cost, drug court fee and restitution, for a total balance of \$10,182.00. The defendant has failed to make any payments, and the total balance still remains." (R. I, 79.)

The district court held a hearing on July 8, 2011. Evertson testified that he knew that his restitution obligation was "a total of \$10,000 plus fees." (R. III, 6.) Evertson admitted that since he had entered into the diversion agreement, he had not made one payment in the last two years. (R. III, 6.) Evertson also stated that he was not steadily employed during that time. (R. III, 6.) Evertson lived with his aunt and uncle and was a student at Washburn University. (R. III, 7.)

Evertson stated that back in May of 2011, he informed the State that he would be able to pay at least \$500.00 towards the restitution. (R. III, 8.) Evertson failed to make that payment as well. Evertson stated that he was waiting for his first paycheck before he

could pay that money. (R. III, 9.) Evertson requested the district court give him additional time to make the payment and not revoke his diversion agreement. (R. III, 12.)

The district court gave Evertson until July 18, 2011, to make the \$500.00 payment. (R. III, 20.) The district court deferred ruling on the motion to revoke diversion and set the next hearing on that date for a status check on whether Evertson had made the payment. (R. III, 20.) Evertson paid \$500.00 cash to the district court on July 12, 2011. (R. I, 7.) Evertson also made two additional \$100.00 payments on August 5, 2011, and January 4, 2012. (R. I, 7-8.)

On June 7, 2012, the district court held another hearing on the State's motion to revoke the diversion agreement. (R. IV, 1-3.) Evertson told the district court he attempted to make payments, but was unable to find steady employment. (R. IV, 4.) Evertson also had the expense of a newborn child and had been supporting the child for two months. (R. IV, 4.)

At the conclusion of the hearing, the district court granted the State's motion to revoke the diversion. (R. IV, 6.) The district court then found Evertson guilty of criminal damage to property and criminal trespass based on the stipulated facts. (R. IV, 6.) The district court sentenced Evertson to 12 months of supervised probation with an underlying term of 8 months with the Secretary of Corrections and 12 months post-release supervision. (R. V, 19-20.) The district court further ordered \$9,482.00 in restitution to be paid in increments of \$100.00 per month. (R. V, 22.) Evertson now appeals the district court's revocation of his diversion agreement. (R. II, 98.)

## ARGUMENTS AND AUTHORITIES

### **I. The district court did not violate Evertson's due process rights when it revoked his diversion agreement.**

Evertson argues that the district court's failure to consider his ability to pay before revoking his diversion agreement violated his due process rights. The State contends that this court should not address this issue for the first time on appeal, as Evertson failed to raise this issue at the district court level. Constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). Evertson never raised this argument in the district court and did not claim that the revocation based on an inability to pay the restitution was a violation of his due process rights.

However, there are three exceptions to the general rule that a constitutional challenge cannot be raised for the first time on appeal, including the following: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558, 561 (2010).

Evertson claims that the second exception is applicable in this case, as a review of this issue is necessary to prevent the denial of his fundamental right to due process. The State submits that Evertson's due process rights are not implicated in this case and the ability to enter into a diversion agreement is based on statutory authority and is not a constitutional right. Therefore, this court should not address this issue on appeal.

Even if this court does address this issue for the first time on appeal, Evertson's claim fails. An issue of statutory interpretation is a question of law subject to unlimited review. *State v. Chavez*, 292 Kan. 464, 465, 254 P.3d 539 (2011).

Evertson argues that the same analysis that applies for a revocation of probation based on failure to pay fines and restitution should apply to a revocation of a diversion agreement. When determining whether to revoke probation based on the failure to pay fines or restitution, the trial court must consider why a probationer failed to pay a fine or court costs or make restitution as required by the conditions of probation. *State v. Duke*, 10 Kan.App.2d 392, 699 P.2d 576 (1985).

Evertson contends that the holding in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), controls the issue in this case. There, the defendant pled guilty to burglary and theft charges and was granted probation on the condition that he paid the fines and restitution. The defendant paid part of the fines and restitution but failed to pay the entire balance when due and claimed poverty as the reason for non-payment. The district court revoked the defendant's probation and sentenced him to prison. On appeal, the Supreme Court held that it is constitutionally impermissible to automatically revoke an indigent defendant's probation and imprison him merely because he cannot pay the fine and make restitution in accordance with the conditions of his probation.

In other words, *Bearden* held that a sentencing court's decision to incarcerate a person for failure to pay a fine or restitution raises due process concerns. But that rule is not applicable in this case and this reasoning should not apply to diversion revocations.



Here, the revocation of the diversion agreement and subsequent conviction and placement on probation did not require a finding of willful failure to pay restitution because it did not implicate imprisoning Evertson. Evertson was sentenced to a term of 12 months supervised probation, not a term of prison. The determination to revoke the diversion agreement is distinguishable from revoking probation and ordering a defendant to serve a prison term. This determination by the district court did not fall into the direct holding of *Bearden* and this court should not extend its application to this case.

Additionally, the State is unaware of any case in Kansas that addresses the issue of whether due process protections prohibit a district court from revoking a diversion for the non-willful failure to pay restitution and Evertson fails to cite to any authority directly on point.

Moreover, the district court's determination to revoke the diversion agreement in this case was properly authorized by the statutes governing diversion agreements. A "Diversion agreement" is defined in K.S.A. 22-2906 as the "specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed." A diversion agreement is authorized by statute under K.S.A. 22-2907 and 22-2909. The district attorney may propose a diversion agreement if it would be in the interests of justice and of benefit to the defendant and the community. K.S.A. 22-2907. K.S.A. 22-2909(a) states that if the defendant fulfills the conditions of the diversion agreement the criminal charges shall be dismissed without prejudice.

The diversion agreement shall include the waiver of all rights to a speedy arraignment, preliminary examination and hearing, and a speedy trial. The diversion agreement may also include provisions concerning payment of restitution. K.S.A. 22-

2909(a). K.S.A. 22-2909(e) also states that a diversion agreement may include a stipulation of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the terms of the diversion agreement and the criminal charges are resumed, the proceedings shall be conducted on the stipulated facts.

K.S.A. 22-2911 outlines the procedure failing to fulfill a diversion agreement.

K.S.A. 22-2911(a) states:

If the county or district attorney finds at the termination of the diversion period or any time prior to the termination of the diversion period that the defendant has failed to fulfill the terms of the specific diversion agreement, the county or district attorney shall inform the district court of such finding and the district court, after finding that the defendant has failed to fulfill the terms of the specific diversion agreement at a hearing thereon, shall resume the criminal proceedings on the complaint.

The statutes governing diversions simply state that if the district court finds that a defendant has failed to fulfill the specific terms of the agreement, the criminal proceedings shall resume. The statute does not prohibit the revocation of a diversion agreement based on a defendant's failure to pay fines or restitution. The statute places no limitation on what the district court can consider in making its determination that the defendant failed to fulfill the obligations of the diversion agreement. The only determination the district court must make is that the defendant failed to fulfill the terms of the diversion agreement.

Here, the diversion agreement included a "Special Condition" that specifically required Evertson to pay restitution and provided a payment schedule for him to follow. The agreement to pay restitution was a fundamental provision in his diversion agreement. Evertson was not required to attend any treatment programs, counseling, or any other classes of any kind. It was clear that the restitution payments were essential to the

diversion agreement and the ultimate dismissal of the criminal charges. If Evertson was unable to pay the restitution, he should not have signed the diversion agreement and agreed to the payment schedule.

Notably, Evertson was given several chances to follow the restitution schedule and make payments before the district court actually revoked the diversion agreement. Evertson allowed a period of two years to pass by without making any payments before the district attorney's office filed its motion to revoke the diversion agreement. Evertson failed to contact the district attorney's office and inform it that he was having trouble making the payments or discuss why he had not yet made any payments. Had Evertson done so, the agreement may have been appropriately modified to work with his financial situation.

In Kansas, a diversion agreement has been recognized to be "essentially a contract between the State (or city) and a defendant, and our courts have generally applied contract principles when interpreting the provisions or legal effect of a diversion agreement. *State v. Bishop*, 44 Kan.App.2d 739, 240 P.3d 614 (2010). Diversion agreements are contractual in nature and contract principles are applied when interpreting diversion agreements. *In re Habeas Corpus Application of Tolle*, 18 Kan.App.2d 491, 856 P.2d 944 (1993); *State v. Chamberlin*, 280 Kan. 241, 245-46, 120 P.3d 319 (2005).

Here, Evertson was bound by the specific terms of the diversion agreement, which included a provision to pay \$10,000.00 in restitution via regular monthly payments. Evertson failed to pay the restitution and therefore, failed to comply with this term of the diversion agreement. There was nothing in the diversion agreement that authorized the district court to only revoke the diversion agreement if it found that the failure to pay the

restitution was willful. Evertson asks this court to read an extra element into the diversion agreement that simply is not there. *See State v. Hurla*, 274 Kan. 725, 733, 56 P.3d 252 (2002) (Court refuses to construe additional terms into diversion agreement that are not present in the agreement itself). The district court properly determined that Evertson had failed to fulfill the terms of his agreement when he did not pay the restitution. The district court was not required to make any inquiry as to why Evertson had not paid, nor was it required to determine that Evertson failure to pay was purposeful or willful.

Additionally, Evertson does not challenge the sufficiency of the evidence that he did not make any payments for the first two years of his diversion agreement. Evertson testified that he knew he was required to make the restitution payments and that he failed to do so. Evertson does not contest that he failed to make the payments, but argues the reasoning for the failure to make the payments is what the district court should have focused on. But, by statute, all that was required of the district court was to find that Evertson failed to comply with the terms of the diversion agreement. Therefore, the district court properly revoked Evertson's diversion agreement and resumed the criminal charges against him.

**II. The district court did not violate Evertson's Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey* when it used Evertson's prior juvenile adjudication to increase his sentence without requiring the State to prove them beyond a reasonable doubt.**

Evertson argues that his Sixth and Fourteenth Amendment rights were violated when the district court used his prior juvenile adjudication to enhance his sentence without requiring the State to prove them to a jury beyond a reasonable doubt in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

This is essentially a challenge to the constitutionality of the Kansas Sentencing Guidelines Act, over which this court has unlimited review. *State v. Fewell*, 286 Kan. 370, 394, 184 P.3d 903 (2008). Additionally, this court is duty bound to follow precedent of the Kansas Supreme Court, absent some indication the court is departing from its previous position. *State v. Morton*, 38 Kan. App.2d 967, 978-79, 174 P.3d 904, *rev. denied* 286 Kan. 1184 (2008).

Evertson concedes that this court has previously decided this issue but includes the issue to preserve it for federal review. The State agrees with Evertson that *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002) controls this issue. Evertson's prior juvenile adjudication can be used to increase his sentence without being proven to a jury beyond a reasonable doubt. Based on the controlling authority of *Hitt* the district court did not violate Evertson's Sixth and Fourteenth Amendment rights. Therefore, Evertson's sentence must be upheld.

### **CONCLUSION**

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Evertson's sentence.

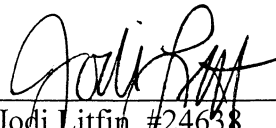
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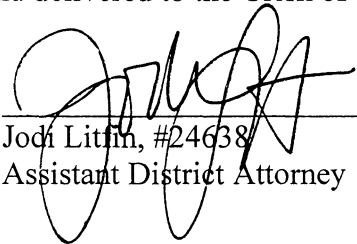
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 10<sup>th</sup> day of December, 2013, to:

Christina M. Kerls, #22234  
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and on that date **sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.



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