

NOT DESIGNATED FOR PUBLICATION

No. 109,124

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RANDALL L. CAPONE,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS H. BORNHOLDT, judge. Opinion on remand filed March 13, 201. Vacated in part and remanded with directions.

Jeremiah Kidwell, of Kidwell & Conkright, of Kansas City, Missouri, and *Jonathan Sternberg*, pro hoc vice of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., BUSER, J., and BUKATY, S.J.

Per Curiam: Randall Capone was convicted of driving under the influence (DUI) on October 1, 2012. Capone's two prior DUI convictions—one from Bourbon County in 1997 and another in Johnson County in 2000—were used in sentencing. Capone argued that the new look-back provision in K.S.A. 2011 Supp. 8-1567(j)(3) should be applied in determining whether his conviction was a first, second, third, fourth, or subsequent DUI.

Capone was arrested on February 13, 2011, and charged with felony DUI, third or subsequent offense, and refusing a preliminary breath test. At his preliminary hearing,

Capone lodged a continuing objection to his case proceeding as a felony rather than a misdemeanor. The district court disagreed and bound him over for trial. Before sentencing, Capone filed a motion for arrest of judgment, arguing he was a first-time DUI offender because DUI convictions that occurred before July 1, 2001, were not to be taken into account under the new look-back provision in K.S.A. 2011 Supp. 8-1567(j)(3). Capone was tried and convicted for the current DUI in late 2012.

The district court denied the motion, finding that the 2011 amendments to K.S.A. 8-1567 were not retroactive under *State v. Reese*, 48 Kan. App. 2d 87, 283 P.3d 233 (2012), *rev'd* 300 Kan. 650, 333 P.3d 149 (2014). On December 6, 2012, the district court sentenced Capone. Capone objected to the use of two prior DUI convictions to sentence him for a felony. The court overruled the objection and sentenced Capone as a third-time DUI offender to 12 months' probation after serving 10 days in jail and 80 days on house arrest, with an underlying sentence of 12 months in jail. Capone timely appealed.

We originally affirmed the trial court's sentence, *State v. Capone*, No. 109,124, 2014 WL 278758 (Kan. App. 2014) (unpublished opinion), but on January 20, 2015, the Kansas Supreme Court vacated our decision as to Issue II regarding the look-back provision and remanded to us for reconsideration in light of *State v. Reese*, 300 Kan. 650, 333 P.3d 149 (2014). The *Reese* court found the look-back provision in effect at the time of sentencing rather than at the time of the offense applied for sentence enhancing purposes. 300 Kan. App. at 657-59. Our decision here as to Issue II was vacated, and the case was remanded to apply *Reese*. We will not repeat the facts and analysis of the original opinion.

The *Reese* court held that K.S.A. 2011 Supp. 8-1567(j)(3) applies to all persons who are sentenced for DUI on or after July 1, 2011, the effective date of the amended statute. 300 Kan. App. at 658-59. Therefore, under *Reese*, Capone's pre-2001 DUI convictions should not have been considered during his sentencing. Consequently, we

vacate Capone's sentence and remand to the district court for resentencing to conform with *Reese*, 300 Kan. 650, Syl.

Sentence vacated in part and case remanded for resentencing.