

Before we proceed to the merits of Schad's arguments, we point out that Schad failed to object to the signage conditions on this basis at the trial court level. Generally, issues not raised before the trial court cannot be raised on appeal. *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003).

Nevertheless, there are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) that the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) that consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) that the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or assignment of a wrong reason for its decision. *State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 (2008). We will address Schad's arguments under the first exception because the issues involve purely legal questions. See *State v. Poulton*, 286 Kan. 1, 5, 179 P.3d 1145 (2008).

### *Signage Conditions*

On appeal, Schad first challenges the constitutionality of the conditions of probation requiring him to post the signs around his house and on his car letting the public know that he is a sex offender. Schad raises two constitutional arguments: (1) that the probation conditions impermissibly restricted his right to privacy without bearing a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense; and (2) that the probation conditions constituted cruel and unusual punishment.

In support of his argument, Schad cites several cases where appellate courts have applied a statutory scheme in determining whether a trial court had the authority to order these types of conditions. See *People v. Meyer*, 176 Ill. 2d 372, 680 N.E.2d 315 (1997); *State v. Muhammad*, 309 Mont. 1, 43 P.3d 31 (2002); *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996). Nevertheless, we do not need to reach Schad's constitutional arguments because we can consider whether the trial court had the statutory authority to impose the signage conditions.

The United States Supreme Court has stated that "if a case may be decided on either statutory or constitutional grounds, [a court], for sound jurisprudential reasons, will inquire first into the statutory question." *Harris v. McRae*, 448 U.S. 297, 306-07, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1985). This practice is based on the deeply rooted doctrine that a court "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105, 89 L. Ed. 101, 65 S. Ct. 152 (1944); see also *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 159 L. Ed. 2d 98, 124 S. Ct. 2301 (2004) ("Always we must balance 'the heavy obligation to exercise jurisdiction,' [citation omitted] against the 'deeply rooted "commitment" not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary. [Citations omitted.]"); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 16 (D.C. 1987); *Caron v. Town of North Smithfield*, 885 A.2d 1163, 1165 (R.I. 2005) ("[T]his court has on many occasions held that it will not decide a case on constitutional grounds if it otherwise can be decided."). In this case, where there is a valid alternative statutory ground for relief, we need not reach Schad's constitutional assertions.

Turning now to the merits of this issue, we note that the probation condition in *Burdin* is very similar to the probation condition requiring Schad to post signs around his house. Specifically, in *Burdin*, the trial court required the defendant to erect a 4-foot by 8-foot sign, stating:

"Warning, all children. [Defendant] is an admitted and convicted child molester. Parents beware," as a condition of his probation. 924 S.W.2d at 84. The defendant argued that the probation condition was not authorized by the sentencing act effective in that state. On the other hand, the State argued that the condition was authorized under the sentencing act and that it was reasonably related to the purpose of the defendant's sentence.

In addressing the parties' arguments, the Tennessee Supreme Court looked to the statutes setting forth the principles of sentencing and the trial court's authority to impose probation conditions. The court noted that the enumerated probation conditions in the statute relating to the trial court's authority to impose probation conditions were closely related to societal duties, focused on the offender and the people charged with the offender's supervision, and offered no dramatic departures from the traditional principles of rehabilitation. The court stated that the primary goal of probation, under the sentencing act and the decisions of its appellate courts, was rehabilitation of the defendant. 924 S.W.2d at 86.

The Tennessee Supreme Court rejected the State's argument that the trial court had the authority to impose the probation condition under the section of the statute allowing the trial court to order a defendant to "[s]atisfy any other conditions reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience or otherwise prohibited by this chapter." 924 S.W.2d at 85. Determining that the subsection did not give the trial court unlimited discretion to impose conditions of probation, the Tennessee Supreme Court stated:

"[The subsection] cannot be read as granting unfettered authority to the courts to impose punishments which are beyond the bounds of traditional notions of rehabilitation. The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. Posting the sign in the defendant's yard would dramatically affect persons other than the defendant and those charged with his supervision. In addition to being novel and somewhat bizarre, compliance with the condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable. Though innovative techniques of probation are encouraged to promote the rehabilitation of offenders and the prevention of recidivism, this legislative grant of authority may not be used to usurp the legislative role of defining the nature of punishment which may be imposed. The power to define what shall constitute a criminal offense and to assess punishment for a particular crime is vested in the legislature. [Citations omitted.]" 924 S.W.2d at 87.

The Tennessee Supreme Court found that the probation condition was not expressly *or implicitly* authorized by the sentencing act. 924 S.W.2d at 87.

Similarly, appellate courts in other states have declared probation conditions requiring defendants to post signs around their houses or on their car to be invalid. In *Muhammad*, 309 Mont. at 3, the trial court imposed a probation condition requiring the defendant to post signs at each entrance of his residence, stating: "CHILDREN UNDER THE AGE OF 18 ARE NOT ALLOWED BY COURT ORDER." The defendant argued that the condition exceeded statutory parameters regarding the dissemination of information concerning sexual offenders. In addressing the defendant's argument, the Montana Supreme Court looked to a Mont. statute, Code Ann. § 46-18-202(1)(e) (1997), which provided that "the sentencing judge may impose any condition 'reasonably related to the objectives of rehabilitation and the protection of the victim

and society." 309 Mont. at 11. The Montana Supreme Court noted that the majority of jurisdictions that had examined probation conditions requiring the placement of signs on defendants' property had concluded that such conditions were not reasonably related to the goals of rehabilitation and the protection of society. 309 Mont. at 11.

In agreeing with the majority of jurisdictions that such signage conditions exceeded express or implicit statutory authority, the Montana Supreme Court stated:

"We agree with the majority of jurisdictions holding that the imposition of such conditions exceeds express or implicit statutory authority granted to trial courts, as the requirement is not reasonably related to serve the goals of rehabilitation and the protection of the victim and society. Therefore, we conclude that the condition requiring the placement of signs at every entrance of Muhammad's residence violates § 46-18-202(1)(e), MCA (1997). This condition, as is the banishment condition, is unduly severe and punitive to the point of being unrelated to rehabilitation. As noted by other jurisdictions, the effect of such a scarlet letter condition tends to over-shadow any possible rehabilitative potential that it may generate. Moreover, the District Court imposed less restrictive means to rehabilitate Muhammad and to protect the victim and society, such as requiring that he obtain sexual offender treatment, have no contact with the victim or her family and register as a sexual offender and as a violent offender, which permits the agency that Muhammad is registered with to disseminate his name to the public with the notation that he is a sexual offender." 309 Mont. at 12.

The Montana Supreme Court vacated the signage condition based upon its determination that the condition was not reasonably related to the goals of rehabilitation and the protection of the victim and society in violation of the statute. 309 Mont. at 12.

In *Meyer*, 176 Ill. 2d at 373, the Illinois Supreme Court determined that a probation condition requiring the defendant to erect a sign that said: "Warning! A Violent Felon lives here. Enter at your own Risk!" was unreasonable and not authorized by its Corrections Code. Under Section 5-6-3(b) of the Illinois Unified Code of Corrections, 730 ILCS 575-6-3(b) (West 1994) the trial court was authorized to impose 16 permitted conditions of probation "in addition to other *reasonable* conditions." 176 Ill. 2d at 377, 378. The State argued that the signage condition was a reasonable condition of probation because it was consistent with the permissible conditions listed in section 5-6-3(b) and furthered the goals of probation.

In rejecting the State's argument, the Illinois Supreme Court stated:

"We hold that section 5-6-3(b) of the Code did not authorize the trial court to require the sign as a condition of the defendant's probation. The sign contains a strong element of public humiliation or ridicule because it serves as a formal, public announcement of the defendant's crime. Thus, the sign is inconsistent with the conditions of probation listed in section 5-6-3(b), none of which identify public notification or humiliation as a permissible condition. Further, we determine that the sign may have unpredictable or unintended consequences which may be inconsistent with the rehabilitative purpose of probation." 176 Ill. 2d at 382.

The Illinois Supreme Court further noted that the nature and location of the sign were likely to have an adverse effect on innocent individuals who might reside with the defendant. 176 Ill. 2d

at 382. Determining that the signage condition was unreasonable under its corrections code, the Illinois Supreme Court stated:

"The judicially developed condition in the case at bar does not reflect present penological policies of this state as evidenced by our Unified Code of Corrections. The authority to define and fix punishment is a matter for the legislature. [Citation omitted.] The drastic departure from traditional sentencing concepts utilized in this case is not contemplated by our Code. Therefore, we determine that the erection of the sign as a condition of probation was unreasonable, and may be counterproductive to defendant's rehabilitative potential." 176 Ill. 2d at 383.

As a result, the Illinois Supreme Court vacated the signage condition. 176 Ill. 2d at 383; see also *People v. Letterlough*, 86 N.Y.2d 259, 631 N.Y.S.2d 105, 655 N.E.2d 146 (1995) (probation condition requiring defendant to affix florescent sign that stated "convicted dwi" to the license plate of any vehicle he drove declared invalid; condition could not be regarded as rehabilitative measure authorized by statute).

Like the particular statutes in *Burdin* and *Meyer*, K.S.A. 21-4610(c) sets out the conditions of probation that a trial court is authorized to impose. Under K.S.A. 21-4610(c), there are 14 nonexclusive probation conditions that a trial court may impose. As in *Burdin*, most of the enumerated conditions in K.S.A. 21-4610(c) are closely related to conventional societal duties—productive, suitable employment; support of dependents; establishment of a residence within the community; participation in educational and rehabilitative programs; cooperation with supervising agencies; avoidance of injurious or vicious habits; avoidance of persons or places of disreputable or harmful character; community or public service work; and restitution.

The enumerated conditions in K.S.A. 21-4610(c) reflect the legislature's intent that the main goal of probation is rehabilitation. Our Supreme Court has stated that "[t]he primary purpose of probation is the successful rehabilitation of the offender. Toward that end courts are authorized to impose conditions and restrictions on the probationer's liberty to afford the probationer a setting conducive to the rehabilitative process. [Citation omitted.]" *State v. Turner*, 257 Kan. 19, 24, 891 P.2d 317 (1995). Quoting *State v. Dubish*, 236 Kan. 848, 853-54, 696 P.2d 969 (1985), our Supreme Court further outlined the nature of probation as follows:

"The basic purpose for probation is to provide a program whereby an individual is given the opportunity to rehabilitate himself without institutional confinement under the supervision of a probation official and under the continuing power of the district court to impose institutional punishment for the original offense if the probationer abuses this opportunity. It permits the sentencing judge to give a convicted person the opportunity to mend his ways and his freedom under conditions imposed. Probation is not granted out of a spirit of leniency, but is granted as a result of the evaluation of the characteristics of the offender and a determination that the offender may respond best to supervised control within the community and that public safety will not be endangered. On the other hand, confinement is for individuals who are required to be isolated from the community in order to protect society or to provide a closely controlled environment for individuals who can learn to adjust their attitude or behavior for later release into the community." *Turner*, 257 Kan. at 24.

See also *Roberts v. United States*, 320 U.S. 264, 272, 88 L. Ed. 41, 64 S. Ct. 113 (1943) (The basic purpose of probation is to provide an individualized program offering young or unhardened

offenders an opportunity to rehabilitate themselves without institutional confinement under the tutelage of probation officials and under the continuing power of the court to impose institutional punishment for their original offense if they abuse the opportunity.).

In his appellate brief, Schad cites part of the above language from *Dubish* and *Turner* and argues that the conditions of probation did not give him the opportunity to rehabilitate himself.

Here, in placing Schad on probation, the trial court declared that there was "little chance of recidivism." This was supported by the psychological evaluation report, which stated that Schad was not "a public risk." In the psychological evaluation report, Schad was described as "an aging person showing poor judgment in the face of mitigating circumstances." The trial court's stated reason for ordering the probation conditions requiring Schad to post signs around his house and on his car declaring his sex offender status was to protect people who were new to the community and might not know that Schad was a convicted sex offender. The trial court never pronounced a rehabilitative goal for imposing those probation conditions.

Moreover, a review of the record in this case fails to show how those probation conditions would fit within the bounds of rehabilitating Schad. To the contrary, the conditions would actually deter Schad's rehabilitation as they would make it nearly impossible for Schad to assimilate himself within the community. Everywhere Schad would go, he would be explicitly identified as a sexual offender. The probation conditions requiring Schad to post signs on his property and on his car represented the criminal act that he had committed and was a badge of shame for all to see. As noted by other jurisdictions, "the effect of such a scarlet letter condition tends to over-shadow any possible rehabilitative potential that it may generate." *Muhammad*, 309 Mont. at 12.

Indeed, the signage conditions in the present case are reminiscent of *Branded*, a television Western series which aired on NBC from 1965 through 1966. The series starred Chuck Connors as Jason McCord, a United States Army captain who had been court-martialed for cowardice and forced to leave the Army. Some of the lyrics of the theme song were as follows:

"Branded!

"Marked with a coward's shame.

"What do you do when you're branded . . . ?"

According to the theme song, "[McCord] was innocent, Not a charge was true." But this did not change how people, as a whole, viewed McCord.

Essentially exiled, McCord traveled the west from job to job, always ready to move on when his current employer would learn about his notorious reputation for cowardice. In the series, McCord, as he traveled throughout the west, suffered unimaginable taunts and deadly threats from people who learned about his reputation. The theme song ends with these telling lyrics:

"And wherever you go

"For the rest of your life

"You must prove

"You're a man!"

In McCord's case, these final lyrics condemned him to a life of wandering and trying to prove to others that he was not a coward. Indeed, the lyrics expressed a very harsh and unforgiving censure against McCord for his alleged cowardice.

Similarly, in the present case, the signage conditions exact a very harsh censure against Schad. Although Schad had been convicted of a sexual offense, the imposed signage conditions would work against any rehabilitation while on probation because wherever Schad would be, he would be "branded." The signage conditions would not be helpful in restoring Schad to the ranks of society's productive citizens.

Further, despite the trial court's ruling, the conditions are not reasonably related to the protection of the public. The trial judge noted that everyone in the small town where Schad lives knows about his sex offender status. The trial judge's concern was with people new to the community.

Nevertheless, the population of Hudson, Kansas, and the number of housing units within the town, which are listed in the 2000 United States Census, are 133 people and 68 housing units, respectively. In taking judicial notice of this fact under K.S.A. 60-412(c), we have afforded both Schad and the State reasonable opportunity to respond to the taking of such judicial notice in compliance with K.S.A. 60-412(d). There being no objection by the parties, we have taken judicial notice of the 2000 United States Census results relating to Hudson, Kansas.

With such a small population in Hudson, the town where Schad resides, it is unclear how anyone moving into the town would not swiftly be made aware of Schad's sexual offender status. Because he is a convicted sexual offender, Schad was required to comply with the registration requirements of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.* See K.S.A. 22-4907. The information concerning Schad's sex offender status, his address, the cars he owned, and other pertinent information would be made available to the public through the registration and notification statutes of the KORA. See K.S.A. 22-4909. Someone moving into the community with small children could access this information either through the Stafford County Sheriff's office or the Internet.

Moreover, the following provisions of K.S.A. 22-4909 mandate notification of schools and licensed child care facilities of the Kansas Bureau of Investigation Internet website and any website containing offender registration information:

"(c) The state department of education shall annually notify any school upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any grades one through 12 of the Kansas bureau of investigation internet website and any internet website containing information on the Kansas offender registration sponsored or created by the sheriff of the county in which the school is located for the purposes of locating offenders who reside near such school.

"(d) The secretary of health and environment shall annually notify any licensed child care facility of the Kansas bureau of investigation internet website and any internet website containing information on the Kansas offender registration sponsored or created by the sheriff of the county in which the facility is located for the purposes of locating offenders who reside near such facility.

"(e) Such notification required in subsections (c) and (d) shall include information that the sheriff of the county where such school or child care facility is located is available to the school and child care facilities to assist in using the registry and providing additional information on the registered offenders."

With such widespread dissemination of information concerning sexual offender registration and with the small size of Schad's community, we feel confident that any person moving into the community would quickly be made aware of Schad's sexual offender status.

In addition to the registration and notification requirements of the KORA, the trial court in this case had imposed other conditions to protect the victim and society by ordering Schad to remain under house arrest, to not have contact with the victim or any children under the age of 16, and to attend sexual offender treatment. Because measures to protect the public were already in place, the trial court's order was unduly severe and did not reasonably relate to the protection of the public. See *State v. Scott*, 265 Kan. 1, 9-10, 14-15, 961 P.2d 667 (1998) (recognizing that legislature has enacted sexual offender registration requirements so that public has opportunity to defend themselves from danger posed by sex offenders).

Under the facts of this case, the probation conditions requiring Schad to post signs around his house and on his car announcing his sex offender status were not reasonably related to the rehabilitative goal of probation or to the protection of the victim and society. In short, probation is not to shield guilty individuals from the consequences of their crimes, but it is an attempt to reform their attitudes about acting out in a criminal way. Here, the signage conditions made Schad an object of condemnation and ridicule. The signage conditions only confirmed society's outrage against Schad. The signage conditions were simply a punitive measure not reasonably related to rehabilitation.

As in *Burdin*, *Muhammad*, and *Meyer*, the conditions imposed were not expressly or implicitly authorized by K.S.A. 21-4610(c), the statute governing the conditions of probation. Because the trial judge went outside of his authority in ordering the probation conditions requiring Schad to post the signs around his house and on his car, we reverse and remand the case with directions for the trial court to sever the signage conditions from the order of probation.