

NOT DESIGNATED FOR PUBLICATION

No. 121,271

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

HARRY RAYTON III,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Opinion filed January 10, 2020. Affirmed.

Submitted by the parties for summary disposition pursuant to K.S.A. 2018 Supp. 21-6820(g) and (h).

Before ARNOLD-BURGER, C.J., MALONE and POWELL, JJ.

PER CURIAM: Harry Rayton III appeals the district court's decision to revoke his probation and impose his underlying 17-month prison sentence. We granted Rayton's motion for summary disposition under Supreme Court Rule 7.041A (2019 Kan. S. Ct. R. 47). After reviewing the record, we find that the district court did not abuse its discretion in revoking Rayton's probation. We, therefore, affirm.

FACTUAL AND PROCEDURAL HISTORY

Pursuant to a plea agreement with the State, Rayton pled no contest to one count of eluding police, an offense that was committed in November 2017. In exchange for his

plea, the State dismissed four other charges. The district court accepted Rayton's plea, found him guilty, and sentenced him to a controlling term of 17 months in prison but granted his motion for a dispositional departure to probation for a term of 12 months.

Just shy of a year later, the State moved for an order to show cause why Rayton's probation should not be revoked. The State alleged, among other things, that Rayton failed to report to his probation officer on numerous occasions, failed to report for a quick-dip sanction imposed by his probation officer, and used illegal drugs while on probation. Rayton stipulated to violating conditions of his probation. The district court revoked Rayton's probation and ordered him to serve his original 17-month sentence with the Kansas Department of Corrections.

Although the sentencing journal entry reflects that the reason for imposing the underlying term was "public safety or offender welfare" under K.S.A. 2018 Supp. 22-3716(c)(9)(A), this was not the reason stated by the district court at the sentencing hearing. But it is the sentence as imposed from the bench that governs over a competing journal entry. *Abasolo v. State*, 284 Kan. 299, Syl. ¶ 3, 160 P.3d 471 (2007). At the revocation hearing, the State noted the violations and asked the district court to impose the underlying prison sentence without imposing intermediate sanctions because Rayton's probation was the result of a dispositional departure sentence. See 2018 Supp. 22-3716(c)(9)(B). From the bench, the district judge agreed, noting, "You're a presumed sentence for prison." There was no discussion of public safety or offender welfare. So it is apparent that the district judge simply checked the wrong box on the sentencing journal entry, and Rayton does not claim otherwise.

Rayton appeals the revocation of his probation.

ANALYSIS

On appeal, Rayton contends that the district court abused its discretion by acting unreasonably when it revoked his probation and ordered him to serve his original prison sentence. He argues: (1) he only served quick dips; (2) the allegations underlying the basis of the revocation were the bases for the quick-dip sanctions; and (3) the revocation was not in his best interest. However, Rayton also admits to his probation violations. He further acknowledges that a district court has discretion to revoke probation when a defendant was granted that term of probation as the result of a dispositional departure.

The procedure for revoking a defendant's probation is governed by K.S.A. 2018 Supp. 22-3716. Generally, once a defendant violates the conditions of probation, the decision to revoke probation rests in the district court's sound discretion. *State v. Gumfory*, 281 Kan. 1168, 1170, 135 P.3d 1191 (2006). An abuse of discretion occurs when judicial action is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of fact. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014). The party asserting the district court abused its discretion bears the burden of showing an abuse of discretion. *State v. Stafford*, 296 Kan. 25, 45, 290 P.3d 562 (2012).

Under K.S.A. 2018 Supp. 22-3716, a district court is generally required to impose intermediate sanctions before revoking an offender's probation. See *State v. Huckey*, 51 Kan. App. 2d 451, 454, 348 P.3d 997, *rev. denied* 302 Kan. 1015 (2015). There are exceptions to this general requirement, however, that permit a district court to revoke probation without having previously imposed intermediate sanctions. One such exception is if probation was originally granted as a result of a dispositional departure. See K.S.A. 2018 Supp. 22-3716(c)(9)(B).

Here, the record is clear that Rayton was on probation because the district court granted him a dispositional departure from a presumptive prison sentence. His criminal

history score was A, indicating an extensive criminal history. Rayton acknowledged violating his probation on several occasions, and he served multiple quick-dip sanctions for those violations. Then, at his revocation hearing, Rayton again stipulated to his violations. Those violations included failure to report, failure to remain drug free, and failure to comply with the recommendations of his court services officer. The district judge discussed Rayton's violations with him at great length. Rayton noted that he was an addict and was trying to get his life back on track. The district judge was not unsympathetic.

"I know there is no perfection. People aren't perfect and none of us are, myself included. But I also have a responsibility at times to say, Look, you've been given one great opportunity by not having a prison sentence imposed. Then you get other opportunities about reporting, not using drugs, keeping face-to-face contact, meeting other minimum requirements. And at some point the State says to me, like they are today, He's not getting it, or, He can't do it, Judge, so impose the sentence and be done and then let him go on with his life."

After reviewing the record in this case, we find that the district court's decision to revoke Rayton's probation was not arbitrary, fanciful, or unreasonable. It also was not based on an error of fact or law. Given Rayton's admissions, the number of chances he had been given in terms of a dispositional departure and quick dips, and the fact that he still appeared to be unable to remain drug free and compliant with the terms of his probation, we conclude that reasonable persons could agree with the imposition of his remaining term of imprisonment. Accordingly, we affirm the district court's decision to revoke Rayton's probation and impose his original prison sentence.

Affirmed.