

NOT DESIGNATED FOR PUBLICATION

No. 124,860

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KRISTINA MICHELLE ALBERS,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed March 17, 2023.
Affirmed.

Allie J. Burris, of Blackwell & Struble, LLC, of Saline, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

PER CURIAM: Kristina Michelle Albers appeals the district court's order revoking her probation and requiring her to serve her underlying jail sentence for two counts of misdemeanor theft. On appeal, Albers contends that the district court abused its discretion. Specifically, she argues the district court acted unreasonably in denying her request to modify her underlying sentence. Based on our review of the record on appeal, we conclude that the district court did not abuse its discretion in revoking Albers' probation or by requiring her to serve her underlying sentence. Thus, we affirm the district court's decision.

FACTS

On December 15, 2020—pursuant to the terms of a plea agreement—Albers pled guilty to amended charges of two misdemeanor counts of theft after being originally charged with felony theft. At the time she committed her crimes of conviction in this case, Albers was on probation two other cases. As a result, the district court held a joint hearing to consider her plea in this case as well as to determine whether her probation should be revoked in the other two cases.

After accepting Albers' plea and finding her guilty of the two misdemeanor offenses in this case, the district court immediately proceeded to sentencing. The district court sentenced Albers to 12 months in the Saline County Jail on each count to run concurrent to one another. However, Albers' sentence in this case was to run consecutive to her sentences in her two other cases. The court then suspended Albers' sentence in this case and placed her on probation for a period of 12 months to be supervised by community corrections.

At the time of her sentencing in this case, Albers had violated the terms of her probation in the other cases on four occasions. In one instance, she had absconded. Nevertheless, after sentencing Albers in this case, the district court imposed a 180-day prison sanction for her most recent probation violations in her other two cases. In doing so, the district court admonished Albers that this would be her "last and final opportunity" to succeed on probation.

About six months later, the State filed a motion to revoke Albers' probation in this case. At her probation revocation hearing, Albers admitted to violating the terms of her probation by failing to comply with the sanctions imposed and failing to report as directed. Albers' attorney acknowledged that her probation should be revoked.

Nevertheless, he argued for a modification of her sentence in this case to run concurrent to her sentences in the other two cases.

At the end of the hearing, the district court revoked Albers' probation and ordered her to serve her underlying sentence. The district court explained that Albers had been given several opportunities to succeed on probation and had been advised that she would not be given another opportunity. In addition, the district court observed that Albers was on probation when she committed the offenses in this case. Accordingly, the district court declined Albers' request to modify her sentence. Instead, the district court ordered Albers to serve her sentence in this case consecutive to her sentences in the prior cases.

Thereafter, Albers filed a timely notice of appeal.

ANALYSIS

On appeal, Albers contends that the district court abused its discretion by denying her request for a modification of her sentence in this case and by ordering her to serve her underlying sentence. Albers argues that the district court was aware that she was struggling with substance abuse issues and suggests that she should have been ordered to participate in treatment rather than being required to serve her underlying sentence.

Once a probation violation has been established, we review the district court's decision to revoke and to impose an underlying sentence under an abuse of discretion standard. *State v. Dooley*, 308 Kan. 641, 647, 423 P.3d 469 (2018); *State v. Reeves*, 54 Kan. App. 2d 644, 648, 403 P.3d 655 (2017), *rev. denied* 307 Kan. 992 (2018). In exercising its discretion, the district court must work within the statutory framework of K.S.A. 2021 Supp. 22-3716. Here, there is no allegation that the district court was required to impose an intermediate sanction.

The party asserting that the district court abused its discretion—in this case Albers—bears the burden of establishing such abuse. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018). Unless otherwise required by law, probation is granted as a privilege and not as a matter of right. In other words, probation is considered to be "an act of grace" by the district court. *State v. Gary*, 282 Kan. 232, 237, 144 P.3d 634 (2006).

Albers suggests that the district court's decision to order her to serve her underlying sentence was unreasonable in light of her problems with substance abuse. Evidently, Albers would have us overlook the fact that she violated her probation on at least four prior occasions and that she had previously served a 180-day intermediate sanction for violating the terms of her probation in her prior cases. A review of the record reveals that Albers had once again violated the terms of her probation immediately after being released from her 180-day intermediate sanction. Moreover, Albers stipulated to these new violations.

Under these circumstances, we find that the district court had the statutory authority to revoke Albers's probation and order her to serve the original sentence. Moreover, we find that the district court's decision was reasonable based on Albers' history of being unable to comply with the terms of her probation as established by the district court. Consequently, we will not replace our judgment for that of the district court.

Next, Albers contends that the district court abused its discretion in denying her request to modify her sentence in this case. Albers argues that the district court knew she was facing a significant amount of time in prison in her prior cases; that it was her first probation violation in this case; that she took responsibility for her actions; and that she was battling substance abuse. Again, the district court's decision whether to modify the underlying sentence was a matter within the district court's broad discretion. See K.S.A. 2021 Supp. 22-3716(b)(3)(B)(iii) (upon revocation, the district court can order the

defendant to serve the sentence originally imposed or any lesser sentence). Here, the district court explained its reason for requiring Albers to serve her underlying sentence as originally imposed.

Specifically, the district court found that she had received the benefit of her plea bargain by pleading guilty to two misdemeanors rather than the original felony charge. In addition, the district court noted that Albers had previously been warned that this would be her last chance to succeed on probation. Thus, we find that the district court's decision to reject Albers' request for a sentence modification was reasonable based on the circumstances presented.

In conclusion, we find that the district court did not make a mistake of law or fact in this case. Likewise, we find that the district court's decision was not unreasonable, arbitrary, or capricious. As the record reveals, the district court gave Albers several opportunities to succeed on probation in her prior cases and again in this case. Unfortunately, she was unable to comply with the terms of her probation—even committing another violation shortly after serving an intermediate sanction. We, therefore, conclude that the district court did not abuse its discretion, and we affirm its decision.

Affirmed.