

NOT DESIGNATED FOR PUBLICATION

Nos. 124,895
124,896

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 April 28, 2023.
Reversed and remanded with directions.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Kristina Michelle Albers timely appeals the district court's imposition of her underlying prison sentences in two cases after finding her probation should be revoked. Albers contends the district court failed to follow the appropriate graduated sanctions required by statute based on our Supreme Court's guidance in *State v. Wilson*, 314 Kan. 517, 501 P.3d 885 (2022), and *State v. Clapp*, 308 Kan. 976, 425 P.3d 605 (2018). We agree with Albers the district court incorrectly imposed the underlying prison sentences before applying the statutorily required graduated sanctions. Therefore, we reverse and remand the case to the district court for further proceedings.

FACTS

In 16CR1230, Albers pled no contest to and was convicted of one count each of forgery and attempted theft for acts that occurred in December 2016. The district court imposed a total controlling sentence of 16 months' imprisonment, suspended to 18 months' supervised probation.

Albers' probation did not go well. In November 2017, the State filed a motion to revoke probation, alleging eight technical violations of the terms of probation, largely related to Albers' failure to communicate with or follow the directions of her probation officer. At a hearing in March 2018, Albers stipulated to the violations; the district court imposed a 30-day jail sanction and a new 18-month term of supervised probation.

In June 2019, Albers pled guilty in 19CR454 to one count each of theft and interference with law enforcement for acts committed in May 2019. The district court imposed a total controlling sentence of 12 months' imprisonment, suspended to 18 months' supervised probation. At the same hearing, Albers admitted to violating her probation in 16CR1230 for failing to report to her probation officer, failing to allow her probation officer to visit her home, and failing to submit to urinalysis testing as requested. The district court imposed a 30-day jail sanction and ordered a new term of 18 months' supervised probation.

In August 2020, the State alleged Albers violated her probation in 16CR1230 and 19CR454 by failing to: (1) submit to drug and alcohol testing; (2) obtain a substance abuse evaluation; (3) report to her probation officer; and (4) obtain a mental health intake. The State filed an amended motion in December 2020, further alleging Albers committed new crimes in 20CR1003. In December 2020, Albers pled guilty to two counts of theft in 20CR1003. The district court sentenced her to 12 months in jail, suspended to 12 months' supervised probation. At that same hearing, Albers stipulated to

violating her probation in 16CR1230 and 19CR454 based on the allegations in the State's amended motion. The district court imposed a 180-day prison sanction, followed by 12 months' probation.

In June 2021, the State filed a motion to revoke probation in all three cases, alleging multiple technical violations. In January 2022, Albers stipulated to the violations. The State and Albers' probation officer asked the district court to revoke her probation and impose her underlying sentences. Albers did not suggest an alternative disposition; rather, she asked that if the court revoked her probation, then it modify her sentences in 20CR1003 to run concurrent with her sentences in 16CR1230 and 19CR454. The district court revoked Albers' probation and imposed her underlying sentences in all three cases without modification. Additional facts are set forth as necessary.

ANALYSIS

Albers claims the imposition of her prison sentences in 16CR1230 and 19CR454 violated the graduated sanction provisions of K.S.A. 2016 Supp. 22-3716(c)(1) and K.S.A. 2018 Supp. 22-3716(c)(1). Albers' appeal of 20CR1003 was addressed in *State v. Albers*, No. 124,860, 2023 WL 2558617 (Kan. App. 2023) (unpublished opinion).

Standard of Review

Once a probation violation is established, a district court has discretion to revoke probation unless otherwise limited by statute. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022); see K.S.A. 2022 Supp. 22-3716(b) and (c) (requiring graduated sanctions before revocation in certain circumstances). A district court's decision to revoke a defendant's probation and order the defendant to serve the underlying sentence must be exercised within the applicable statutory framework. A district court abuses its discretion when it makes an error of law, such as improperly interpreting a statute. *Wilson*, 314 Kan.

at 520-21. To the extent the issue on appeal requires us to engage in statutory interpretation, it presents a question of law subject to unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

Discussion

Albers does not dispute she violated the terms of probation. She argues the district court could not impose the prison sanction it did for her current violations because the previous imposition of sanctions had not been imposed using the statutorily required graduated sanctions in the correct order.

Preservation

Albers admits the issue was not raised below but argues a preservation exception applies because the issue on appeal involves a pure question of law and is finally determinative of the case. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (noting exceptions to preservation rule). It is questionable whether a preservation exception is even necessary because the issue on appeal concerns the district court's revocation of her probation—an appealable issue reviewed for an abuse of discretion—and the propriety of the punishment imposed—an alleged error of law, i.e., an abuse of discretion. See *Tafoya*, 315 Kan. at 328. Albers did not take a position on the appropriate disposition before the district court. She did not specifically object to the State's request to revoke probation and impose her underlying sentences; however, she did not agree the district court could do so. She simply asked if the district court imposed her underlying sentences in 16CR1230 and 19CR454, then it modify her sentence in 20CR1003 to run concurrent with her other sentences.

Albers cites to *State v. Wilson*, No. 121,729, 2020 WL 5083545, at *3 (Kan. App. 2020) (unpublished opinion), *rev'd* 314 Kan. 517 (2022), to support her argument the

unpreserved issue here could be reviewed under the same exception as in *Wilson*. Still, it is not clear an exception was needed because the panel noted *Wilson* was challenging his probation revocation, not the prior sanctions imposed—the same issue as here. However, the *Wilson* panel's discussion is somewhat unclear because, in making this point, the panel referred to our Supreme Court's earlier decision in *Clapp. Wilson*, 2020 WL 5083545, at *3. But *Clapp* avoided analyzing the preservation issue, noting the Court of Appeals panel found an exception applied and the State did not challenge it through a cross-petition for review. 308 Kan. at 981. Essentially the same thing happened when our Supreme Court granted review in *Wilson*. 314 Kan. at 520.

While the parties agree the issue needed to be raised below, the parties' agreement on this point is of little consequence as the necessity to object before the district court is essentially a pure question of law. See *State v. Ballou*, 310 Kan. 591, 612-14, 448 P.3d 479 (2019) (discussing contemporaneous objection rule); *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 400, 266 P.3d 516 (2011) (parties' stipulations of law not binding on court). Still, as Albers points out, other panels of this court have recognized and applied a preservation exception in similar contexts. See *State v. Dominguez*, 58 Kan. App. 2d 630, 633, 473 P.3d 932 (2020) (considering retroactivity of other provisions of K.S.A. 22-3716 for first time on appeal). Even assuming a preservation exception is necessary, Albers properly argues a recognized exception. We will review the issue.

Merits

Albers is correct the district court erred in revoking her probation and imposing her underlying prison sentences because it did not follow the graduated sanctions required under K.S.A. 2016 Supp. 22-3716 and K.S.A. 2018 Supp. 22-3716. Parenthetically, we note the relevant provisions under both versions of the statute are identical; therefore, we will refer to the 2018 statute. Specifically, the district court never imposed a two-day or three-day jail sanction as required by K.S.A. 2018 Supp. 22-

3716(c)(1)(B) before imposing a prison sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(D).

Under K.S.A. 2018 Supp. 22-3716(c)(1)(B), when the district court finds a defendant on probation for a felony offense has violated the terms of probation, the district court may impose a two-day or three-day jail sanction. If the defendant later commits additional probation violations, the district court may impose additional jail sanctions under K.S.A. 2018 Supp. 22-3716(c)(1)(B), a 120-day prison sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(C), or a 180-day prison sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(D).

As explained by our Supreme Court, the imposition of sanctions under K.S.A. 2018 Supp. 22-3716(c)(1)(B) is a condition precedent to imposing a sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(D). *Clapp*, 308 Kan. at 986-87. If this condition has not been met, then the 180-day prison sanction has been improperly imposed. A *valid* sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(D) is required before the district court can revoke probation and impose the defendant's underlying prison sentence under K.S.A. 2018 Supp. 22-3716(c)(1)(E). Therefore, a district court cannot revoke a defendant's probation and impose the underlying sentence without first having imposed a sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(B). See *Wilson*, 314 Kan. at 524; *Clapp*, 308 Kan. at 986-87.

Here, the district court's prior imposition of two 30-day jail sanctions for Albers' earlier probation violations was authorized under K.S.A. 2018 Supp. 22-3716(c)(1)(B); however, "[s]uch confinement is *separate and distinct from* the violation sanctions provided in subsection (c)(1)(B), (c)(1)(C), (c)(1)(D), and (c)(1)(E)" (Emphasis added.) Based on this plain language, we observe the district court did not impose a jail sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(B) in its earlier efforts to persuade Albers to comply with the terms of her probation. Based on *Wilson* and *Clapp*, the district

court could not jump to the 180-day prison sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(D) without first imposing at least one jail sanction under K.S.A. 2018 Supp. 22-3716(c)(1)(B). See *Wilson*, 314 Kan. at 524. Accordingly, the district court lacked the statutory authority under these facts to impose Albers' underlying prison sentences upon revoking her probation.

Contrary to the State's arguments, the error cannot be deemed harmless based on Albers committing new crimes. The fact Albers committed the new crimes as reflected by her pleas in 20CR1003 was used as the basis for the district court's finding she violated her probation in 16CR1230 and 19CR454 for which it imposed the 180-day prison sanction. The district court cannot impose punishment twice for the same violation. See *State v. Henson*, No. 119,257, 2019 WL 2398042, at *3 (Kan. App. 2019) (unpublished opinion) ("The trial court lacked the statutory authority to impose a second graduated sanction for a violation that preceded the imposition of the first sanction. Implicit in the graduated sanction statutory scheme is the commission of a new violation after the defendant had served the previous sanction."). Just because the district court *could* have relied on statutory bypass provisions at the prior revocation proceeding does not provide it with the opportunity to do so again at the dispositional hearing from which this appeal arises. "[H]armless error cannot save the probation revocation. The district court judge must apply the proper legal standard." *Wilson*, 314 Kan. at 525. "[W]hile '[a] reviewing court may think it understands how a district court should view these circumstances, . . . it cannot know for sure until the lower court does the analysis.' 312 Kan. at 201." *Wilson*, 314 Kan. at 524-25.

Simply put, the district court was required to take two steps under the graduated sanctions scheme of K.S.A. 2018 Supp. 22-3716 before revoking Albers' probation, and it missed the first step. Under *Wilson* and *Clapp*, the district court's failure to follow the required graduated sanctions requires remand for a new dispositional hearing. If the district court declines to impose the appropriate graduated sanction, it must make the

required findings under a statutorily authorized bypass provision. See K.S.A. 2018 Supp. 22-3716(c)(9)(A); *Wilson*, 314 Kan. at 525; *Clapp*, 308 Kan. at 991.

Reversed and remanded with directions.