NOT DESIGNATED FOR PUBLICATION

No. 125,080

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ANDREW ALEXANDER BROWN II,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed May 12, 2023. Affirmed in part and dismissed in part.

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

Kristi D. Allen, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GARDNER, P.J., HILL and PICKERING, JJ.

PER CURIAM: Andrew Alexander Brown II appeals the revocation of his probation. Finding no error, we affirm in part and dismiss in part.

Factual and Procedural Background

Andrew Alexander Brown was required to register as an offender after being convicted of aggravated indecent liberties with a child in 2014. Brown first violated his

registration requirements in 2016. He later pleaded guilty to again violating these requirements in April 2019.

At sentencing, the parties jointly recommended that Brown be granted a dispositional departure sentence of 36 months' probation. The district court followed this recommendation, granting Brown the requested term of probation and sentencing him to a suspended term of 120 months in prison.

Around three months later, the State filed a probation violation warrant against Brown, claiming that he had committed a new crime, domestic violence against K.E., as alleged in a separate criminal complaint. The district court held an evidentiary hearing to consider this warrant and the State's motion to revoke Brown's probation.

At the hearing, the State had intended to present testimony from K.E. but she did not appear. Still, the State presented testimony from the officer who responded to the incident. Yet the district court held that the State failed to prove that Brown violated his probation as alleged.

A few months later, the State filed a second warrant. This one alleged that Brown had committed a new crime of aggravated domestic battery against K.E. by choking her. The State filed another separate criminal complaint against Brown for his related actions. The State filed a third warrant against Brown about a month later alleging that Brown had violated a court order not to contact K.E., as alleged in yet another complaint.

The district court held an evidentiary hearing to consider the new probation violation allegations. After considering the State's evidence—including K.E.'s testimony and a letter sent by Brown to K.E.—the district court found that Brown violated his probation as alleged in both warrants.

As for disposition, the State argued that Brown's criminal history and behavior while on probation—including his commission of new crimes—showed that he was not amenable to probation or able to follow court orders. The State thus asked the district court to impose Brown's original prison sentence without modification. Brown, however, asked the court to continue his probation revocation hearing until the new criminal charges against him were resolved. He argued that his new case could lead to a significant prison sentence, making imposition of his original sentence excessive. Brown alternatively asked the district court to impose a modified sentence of one or two years of imprisonment.

The district court revoked Brown's probation and ordered him to serve his previously suspended sentence of 120 months. The district court found that it could bypass the statutorily prescribed intermediate sanctions for two reasons:

- Brown had received a departure sentence; and
- he had committed a new crime.

As for the length of Brown's prison sentence, the district court noted that Brown's sentence properly reflected his crime, criminal history, and plea agreement. The court also noted the significance of Brown's new crimes against K.E. and reasoned that Brown was not amenable to probation because he had been under supervision when he committed his previous offenses for failing to register.

Brown timely appeals the district court's revocation decision.

We do not revisit Brown's original sentence.

Brown argues that the district court abused its discretion by revoking his probation and sentencing him "to prison for 10 years for an address-related violation of the Kansas

Offender Registration Act that, at most, lasted five days" because such a decision was unreasonable. He also contends that his sentence was too long given his circumstances (homelessness and only 5 days non-compliant). But these arguments appear to challenge Brown's original sentence and conviction; they are thus untimely. See K.S.A. 2018 Supp. 22-3608(c) (requiring appeal of sentence be filed within 14 days of sentencing date); *State v. Inkelaar*, 38 Kan. App. 2d 312, 317-18, 164 P.3d 844 (2007) (holding that defendant's notice of appeal was timely only as to his probation revocation and not as to his original sentence).

Brown's argument about intermediate sanctions is unpreserved.

Brown also claims that rather than revoke his probation, a reasonable person would have imposed an intermediate sanction. Brown recognizes our general rule that issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). And he concedes that he did not request an intermediate sanction in the district court. Still, he argues that this court considered a similar argument for the first time on appeal in *State v. Dominguez*, 58 Kan. App. 2d 630, 473 P.3d 932 (2020). Brown asks us to review his claim based on the same reasons discussed in that case.

But the *Dominquez* panel's reasoning for granting appellate review does not apply here. In *Dominguez*, the appellant's claim related to retroactively applying probation violation statutes and which version of the statutes applied to her probation violation. Though unpreserved, this court found that this claim was a question of law based on proved or admitted facts and finally determinative of the matter on appeal. The panel thus applied an exception to the general rule precluding appellate review of unpreserved claims in deciding to grant review. 58 Kan. App. 2d at 633 (citing *State v. Hirsh*, 310 Kan. 321, 338, 446 P.3d 472 [2019]).

Brown does not argue that any exception to our preservation rule applies. Yet he needed to. Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires appellants to explain why the appellate court should consider an issue that was not raised in the district court. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (noting common preservation rule exceptions). And Brown's argument requires consideration of the facts specific to his case. We thus dismiss Brown's argument about lack of an intermediate sanction as unpreserved.

We find no abuse of discretion in the revocation of probation.

We next reach Brown's primary contention that the district court abused its discretion by deciding to revoke his probation. A judicial action is an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Brown's only contention on appeal is that no reasonable person would have ordered him to serve his prison sentence rather than impose an intermediate sanction after properly considering the surrounding circumstances.

Once a probation violation is established, a district court has discretion to revoke probation unless the court is otherwise limited by statute. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). The district court here was not limited by the statutes requiring intermediate sanctions because K.S.A. 2022 Supp. 22-3716(c)(7)(C) allows a district court to bypass intermediate sanctions if the defendant commits a new crime while on probation. Likewise, a district court may bypass intermediate sanctions if the offender's probation "was originally granted as the result of a dispositional departure." K.S.A. 2022 Supp. 22-3716(c)(7)(B). Brown met both exceptions permitting the court to revoke probation without ordering intermediate sanctions.

Because Brown does not argue that the district court made an error of fact or law, our inquiry is solely whether a reasonable person would agree with the court's decision to revoke his probation. We hold that they would.

Brown alleges that he complied with other conditions of his probation, and that the district court should have considered the cost of incarceration before revoking his probation. But the policy argument about the cost of incarceration is one for the Legislature, not the courts. And Brown did not raise these points in the district court. We find nothing erroneous or unreasonable in the district court's alleged failure to consider these matters.

Our review shows that the district court acted within its discretion and within the applicable law by revoking Brown's probation and imposing his underlying sentence without modification. We thus affirm the district court on this issue.

Affirmed in part and dismissed in part.