

NOT DESIGNATED FOR PUBLICATION

No. 125,238

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALEXANDER MADRID,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Opinion filed August 4, 2023.
Affirmed.

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

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: Alexander Madrid appeals the district court's decision to revoke his probation after police officers found heroin in Madrid's vehicle. Madrid contends that the district court erred by finding that the State met its burden to prove he violated his probation, and that the district court abused its discretion by ordering him to serve his prison sentence instead of letting him remain on probation. Finding no error, we affirm.

Factual and Procedural Background

In March 2021, Madrid pleaded guilty to possession of paraphernalia to distribute or manufacture illegal drugs. The district court sentenced him to 18-months imprisonment but suspended that sentence in favor of 12 months of probation.

In September 2021, Madrid's court services officer filed a warrant alleging that Madrid had violated his probation by being unsuccessfully discharged from substance abuse treatment due to lack of attendance. The next month, Madrid admitted those allegations at a probation violation hearing. The district court imposed a two-day jail sanction, transferred probation to Community Corrections, extended Madrid's probation for one year, and ordered Madrid to complete an outpatient treatment program.

In December 2021, Madrid's intensive supervision officer (ISO) filed a warrant alleging that Madrid had violated his probation by: (1) possessing heroin; (2) committing the offense of unlawful possession of a narcotic; and (3) failing to notify his ISO within 24 hours of law enforcement contact. At the probation violation hearing in March 2022, the State requested a continuance because the alleged heroin had not yet been tested by the lab. The district court granted the State's request.

In May 2022, the district court held the probation violation hearing. Tyler Page, a police officer for the City of Wichita, testified first. He had been monitoring a Canterbury Inn around 11 p.m. on December 9, 2021, because the Wichita Police Department had many reports about criminal activity there. While monitoring that location, Page noticed in the parking lot a white Ford Explorer with chrome wheels and a broken window. Page had seen the same vehicle on previous occasions.

When the vehicle left the Canterbury Inn, Page followed it to the highway and stopped it after the driver failed to use a turn signal when merging. After approaching the

vehicle, Page identified Madrid as the driver and Seth Torres as the passenger. He learned the vehicle was registered to Madrid. Soon after, Page learned Madrid had two active warrants, so he arrested Madrid.

At some point, police called for a canine unit. After it arrived, Police Officer Brandon Faulkner led the dog around the vehicle until it alerted to something on the driver's and passenger's sides of the vehicle. Faulkner then helped search the vehicle and found a bag with drug paraphernalia in the vehicle's hatch. Another police officer, Kevin Dykstra, also searched the vehicle and found inside the dashboard a knotted baggy with a brown substance that he believed was drugs. A field test showed the substance was heroin. Officers also arrested Torres because they found drug paraphernalia on his person.

The district court found that the State had proven by a preponderance of the evidence that Madrid possessed heroin and committed the offense of unlawful possession of a narcotic. The third allegation in the revocation warrant was withdrawn. Thus, the district court concluded Madrid violated his probation.

Madrid timely appeals.

Did the District Court Err by Finding the State Met Its Burden to Prove Madrid Violated His Probation?

Madrid first argues that the district court erred by finding the State met its burden to prove he violated his probation.

The State must establish that the probationer violated the terms of probation by a preponderance of the evidence—by showing that the violation is more probably true than not true. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). Appellate

courts review the district court's factual findings for substantial competent evidence. *State v. Inkelaar*, 38 Kan. App. 2d 312, 315, 164 P.3d 844 (2007). "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion." *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014). In determining whether substantial competent evidence supports the district court's findings, we must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the district court's findings and must disregard any conflicting evidence or other inferences that might be drawn from it. *Gannon*, 298 Kan. at 1175-76 (citing *Unruh v. Purina Mills*, 289 Kan. 1185, 1195-96, 221 P.3d 1130 [2009]). Appellate courts thus do not reweigh the evidence or assess the credibility of witnesses. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014).

Madrid argues the State never proved that he possessed the drugs found in his car, as it was possible that someone else, including Torres, possessed the drugs found in the vehicle instead of him. We disagree. As the State points out, possession is defined as "having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control." K.S.A. 2021 Supp. 21-5701(q).

True, under the theory of constructive possession, the State must prove more than a "mere presence or access to the drugs." *State v. Cruz*, 15 Kan. App. 2d 476, 489, 809 P.2d 1233 (1991); see *State v. Fitzpatrick*, No. 115,847, 2017 WL 383438, at *3 (Kan. App. 2017) (unpublished opinion). Along with presence or access, the State must provide additional incriminating circumstances, which included factors such as:

"(1) a defendant's previous participation in the sale of a controlled substance; (2) his or her use of controlled substances; (3) his or her proximity to the area where the drugs are found; (4) the fact that the drugs are found in plain view; (5) incriminating statements of the defendant; (6) suspicious behavior by the defendant; and (7) proximity of defendant's

possessions to the drugs. *State v. Marion*, 29 Kan. App. 2d 287, 290, 27 P.3d 924, *rev. denied* 272 Kan. 1422 (2001); see PIK Crim. 3d 67.13-D." *State v. Dean*, 42 Kan. App. 2d 287, 290, 208 P.3d 343 (1999).

Here, the State showed more than just Madrid's presence in close proximity to the drugs. He drove his own vehicle. Police officers found a baggie of heroin inside the dashboard of Madrid's vehicle. They also located several syringes and a metal spoon that had suspected drug residue in a bag in the hatch of Madrid's vehicle. These facts are enough to show that Madrid possessed the drugs in his car. The district court did not err in so finding.

Did the District Court Abuse Its Discretion by Revoking Madrid's Probation?

Madrid next argues the district court abused its discretion by ordering him to serve his underlying sentence.

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). Appellate courts review "the propriety of the sanction for a probation violation imposed by the district court for an abuse of discretion." 315 Kan. at 328. A judicial action constitutes 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). Madrid, as the party asserting the district court abused its discretion, bears the burden of showing such abuse of discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021)

But Madrid fails to show any abuse of discretion. His argument mainly discusses changes the Legislature has made to K.S.A. 22-3716 and argues that drug treatment is

more effective than prison. Yet that policy argument is misplaced with our court and fails to show any abuse of discretion.

Under K.S.A. 2021 Supp. 22-3716(c)(7)(C), a district court may revoke probation if "the offender commits a new felony or misdemeanor while the offender is on probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction." Madrid acknowledges that possessing drugs is a crime. And as stated above, the State showed and the district court found that he committed a new crime by possessing heroin.

Although the district court could have done something other than revoking Madrid's probation, K.S.A. 2021 Supp. 22-3716(c)(7)(C) allowed the district court to do what it did. Madrid's argument also fails to acknowledge that the district court had already imposed a two-day jail sanction when Madrid violated his probation the first time. So the district court had given Madrid a second chance to succeed on probation, even though he admitted to having violated its terms. Yet Madrid violated his probation again. As a result, reasonable people could agree with the district court's decision to revoke Madrid's probation. We thus find no abuse of discretion in revoking Madrid's probation.

Affirmed.