NOT DESIGNATED FOR PUBLICATION

Nos. 125,329
125,330

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

GUADALUPE INCHAURIGO,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Submitted without oral argument. Opinion filed December 1, 2023. Reversed and remanded with directions.

Corrine E. Gunning, of Kansas Appellate Defender Officer, for appellant.

Sierra M. Logan, assistant district attorney, *Thomas Stanton*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

WARNER, J.: This is a consolidated appeal from the district court's revocation of Guadalupe Inchaurigo's probation in two cases. Inchaurigo argues that the court abused its discretion when it revoked his probation without complying with the statute governing probation revocation, K.S.A. 2019 Supp. 22-3716. After reviewing the parties' arguments and the record, we agree that the court's decision did not comply with this statutory framework. We therefore reverse the revocation of Inchaurigo's probation and remand for a new dispositional hearing.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2021, Inchaurigo pleaded guilty to two counts of driving under the influence (DUI) in violation of K.S.A. 2019 Supp. 8-1567(b)(1)(E). These pleas resulted in Inchaurigo's seventh and eighth DUI convictions.

Each of these convictions carried a sentence of at least 90 days' imprisonment and a fine. At sentencing in August 2021, the district court imposed consecutive 12-month prison sentences for each conviction. Then, following the parties' recommendation in the plea agreement, the court suspended the sentences and ordered Inchaurigo to serve 90 days in jail followed by 12 months' probation, granting credit for time served on one of these offenses and allowing Inchaurigo to serve the second incarceration period under house arrest.

In January 2022, the State moved to revoke Inchaurigo's probation in both cases. The State alleged that Inchaurigo failed to report to community corrections on two occasions, admitted to drinking alcohol on one day in November 2021, and failed to contact his intensive supervision officer. The district court held a hearing on the State's motion in April 2022, and Inchaurigo stipulated to the probation violations. Based on the parties' joint recommendation, the district court ordered a 60-day jail sanction followed by 90 days of electronic alcohol monitoring. It also reinstated a 12-month probation term. On April 28, 2022, the district court released Inchaurigo early from the 60-day jail sanction to attend inpatient alcohol treatment.

A little more than a month later, on June 6, 2022, the State again moved to revoke Inchaurigo's probation in both cases. The State alleged that Inchaurigo failed to report to community corrections for random urinalysis testing on June 1; it also alleged that on the next day, he had a blood alcohol content of 0.327 and admitted to drinking alcohol.

The district court held a hearing on the State's motion. At the hearing, Inchaurigo again stipulated to these probation violations. The State requested that the district court revoke Inchaurigo's probation and impose his underlying sentences. Inchaurigo's attorney asked the district court to order another 60-day jail sanction and reinstate probation. Inchaurigo's attorney emphasized Inchaurigo's honesty with his intensive supervision officer and asked for the district court to give him one more chance on probation and to get treatment for his alcohol use. Inchaurigo expressed his willingness to receive alcohol treatment for as long as necessary.

After considering these arguments, the district court denied Inchaurigo's request, revoked his probation, and ordered him to serve his underlying prison sentences. It explained that "people" receive treatment for alcoholism "and they violate the rules and then they get kicked out" of the treatment centers. The court noted that it was "concerned" that in Inchaurigo's "next relapse," he was going to "kill[] somebody." The court added that it was ordering Inchaurigo to serve the underlying prison sentences "because I don't know anything else that I can really think of that's going to work."

The court's journal entry for this decision indicated Inchaurigo's probation had been revoked because he committed a new crime, not based on any finding regarding public safety or Inchaurigo's welfare. Inchaurigo appealed, and this court consolidated his two cases for our consideration.

DISCUSSION

Because Inchaurigo admitted to violating the terms of his probation, the sole issue in this appeal is whether the district court properly exercised its discretion when it determined the consequences of those violations. More specifically, did the district court comply with Kansas law when it revoked Inchaurigo's probation and ordered him to serve his underlying prison sentence instead of imposing an intermediate sanction?

In cases where a person admits to a probation violation, the decision whether to revoke probation "rests within the sound discretion of the district court." *State v. McFeeters*, 52 Kan. App. 2d 45, 47, 362 P.3d 603 (2015). The degree of discretion a district court may exercise varies based on the nature of the question before it. While a district court has broad discretion, for example, to determine whether someone should remain on probation after they have committed a new crime, it has no discretion to disregard statutory limitations or legal standards. See *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015); *State v. Ardry*, 295 Kan. 733, 736, 286 P.3d 207 (2012). A district court abuses its discretion when it veers outside the statutory framework governing the consequences of probation violations. *McFeeters*, 52 Kan. App. 2d at 47-48. Whether a district court's decision was consistent with this framework is a legal question over which our review is unlimited. 52 Kan. App. 2d at 47-48.

This statutory framework has changed over time. Historically, Kansas district courts exercised broad discretion in determining the appropriate action when faced with a probation violation. *State v. Clapp*, 308 Kan. 976, 990, 425 P.3d 605 (2018). But since 2013, the Kansas Legislature has constrained the district courts' discretion in probation revocations. 308 Kan. at 982-84. From 2013 until 2019, the legislature required district courts to impose a series of intermediate sanctions—first a 2- or 3-day jail sanction and then a 120- or 180-day jail sanction—before probation could be revoked in most cases. See, e.g., K.S.A. 2013 Supp. 22-3716(c)(1) (outlining this framework); 308 Kan. at 982-85. In 2019, the legislature removed some of these limitations on courts' discretion. But courts are, for the most part, still required to impose an intermediate sanction of two or three days in jail before probation may be revoked outright. See K.S.A. 2019 Supp. 22-3716(c)(1)(B) and (C).

Before turning to the district court's ruling that is the subject of this appeal, we observe that the parties implicitly agree that the sanction the district court entered for the

first probation violation at the hearing in April 2022—a 60-day jail sanction and an extension of Inchaurigo's probation—was not one of the sanctions permitted or recognized by Kansas law for Inchaurigo's offenses. Rather, K.S.A. 2019 Supp. 22-3716(c)(1)(B) provides for a 2- or 3-day jail sanction—not a 60-day sanction—with no more than 18 days total spent in jail. Although K.S.A. 2019 Supp. 22-3716(c)(9) allows a district court to impose a 60-day sanction for violations when the underlying crime was a felony, that sanction is "separate and distinct from the violation sanctions provided in subsection (c)(1)." And that 60-day sanction is not permitted for people who are serving probation for a felony DUI conviction. K.S.A. 2019 Supp. 22-3716(c)(9). Thus, it appears the district court made an error of law in imposing the 60-day sanction for Inchaurigo's first probation violation for his DUI convictions. But that sanction has no direct bearing on whether the district court erred when it revoked Inchaurigo's probation in the decision now on appeal.

Turning to the district court's decision to revoke Inchaurigo's probation—the subject of this appeal—K.S.A. 2019 Supp. 22-3716(c)(1)(C) allows a district court to revoke a person's probation "if the violator already had a sanction imposed pursuant to subsection (c)(1)(B)." The parties acknowledge that such a sanction had not been imposed in Inchaurigo's case. We therefore must consider whether the statute otherwise permitted the probation revocation without first imposing a 2- or 3-day jail sanction.

K.S.A. 2019 Supp. 22-3716(c)(7) provides four avenues by which a court may depart from this intermediate-sanction framework. This subsection gives a court discretion to revoke a person's probation without imposing a jail sanction if the person who violated probation was originally granted a dispositional departure, has committed a new crime, or has absconded. K.S.A. 2019 Supp. 22-3716(c)(7)(B)-(D). The parties agree that these situations do not apply here, though the district court's journal entry mistakenly indicates that Inchaurigo committed a new crime. Accord *State v. Baldwin*, 37 Kan. App.

2d 140, Syl. ¶ 3, 150 P.3d 325 (2007) (court's oral pronouncement of ruling regarding probation controls over written journal entry).

The only remaining way the district court could have revoked probation was under K.S.A. 2019 Supp. 22-3716(c)(7)(A). This subsection allows a court to revoke probation "without having previously imposed a sanction pursuant to subsection (c)(1)" if the court "finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction." K.S.A. 2019 Supp. 22-3716(c)(7)(A). In other words, before probation may be revoked under this provision, a district court must make findings about why the public's safety would be jeopardized or how the offender's welfare would not be served by the intermediate sanction, in light of the facts of the particular case before it. See *State v. Duran*, 56 Kan. App. 2d 1268, 1274-76, 445 P.3d 761 (2019), *rev. denied* 312 Kan. 895 (2020); *McFeeters*, 52 Kan. App. 2d at 49.

This "particularity requirement . . . is not met when an appellate court must imply the district court's reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the bypassed intermediate sanction." *Clapp*, 308 Kan. 976, Syl. ¶ 4. It naturally follows that "[b]road generalizations that equally could apply to all similar cases are not sufficiently particularized." *Duran*, 56 Kan. App. 2d at 1276. Findings are sufficiently particularized when they are "'distinct rather than general, with exactitude of detail, especially in description or stated with attention to or concern with details.'" *State v. Dooley*, 308 Kan. 641, 652, 423 P.3d 469 (2018).

The Kansas Supreme Court's decision in *Clapp* is instructive. There, the defendant stipulated to the probation violations, and the district court revoked his probation without imposing intermediate sanctions. In doing so, the district court recited the defendant's criminal history, listed his probation violations, and expressed that he did not value the

opportunities he had to change his life while serving probation. The Kansas Supreme Court found that the district court did not "make *any* explicit findings regarding how imposing an intermediate sanction would jeopardize the safety of the public or be contrary to [the defendant's] welfare." 308 Kan. at 989. It also noted that the journal entry contradicted "[a]ny suggestion that the district court was implicitly relying on the bypass provision" of the statute because the district judge did not check the box indicating it relied on this provision in revoking the defendant's probation. 308 Kan. at 989. Thus, the court reversed Clapp's probation revocation and remanded the case for a new hearing on the appropriate sanction. 308 Kan. at 991.

Our review of the record here leads us to the same conclusion. The district judge presiding over Inchaurigo's probation-violation hearing made several comments about that judge's experience in serving on the bench and experience with DUI cases *in general*. The judge expressed concern that someday a repeat DUI offender on probation was going to kill someone. And the judge indicated that, in his experience, many people did not successfully complete treatment for alcohol abuse. But the judge did not specifically reference public safety or Inchaurigo's welfare or analyze whether either would be served by imposing an intermediate sanction in Inchaurigo's case.

And as in *Clapp*, the journal entry of the probation revocation sheds no further light on the district court's rationale. The journal entry states that the court revoked Inchaurigo's probation because he committed a new crime—a finding unsupported by the record and never alleged by the State. The journal entry does not indicate that the court revoked Inchaurigo's probation out of a concern for public safety or for his welfare—both those boxes remain unchecked. As in *Clapp*, the journal entry tends to undermine "[a]ny suggestion that the district court was implicitly relying on the bypass provision" of the statute when it revoked Inchaurigo's probation. 308 Kan. at 989.

In its brief, the State recognizes that the district court never explicitly analyzed what effect an intermediate sanction under K.S.A. 2019 Supp. 22-3716(c)(1)(B) would have on Inchaurigo's welfare or on public safety. But it argues that the district court made multiple statements throughout Inchaurigo's probation—at the hearings on both his first and second probation violations—that, taken together, can be construed as a sufficient finding that revoking probation was needed to protect public safety. We disagree. While the attorneys representing Inchaurigo and the State at both hearings discussed Inchaurigo's difficulties with alcohol, our review of the record shows that the district judge's statements at both hearings largely concerned the judge's historical observations of people who were convicted of DUI. The judge then summarized his thoughts in addressing Inchaurigo: "What I'm concerned about is . . . your next relapse you're killing somebody." This statement is not sufficient to comply with K.S.A. 2019 Supp. 22-3716(c)(7)(A)'s particularized-finding requirement.

In stressing the importance of particularized findings, Kansas appellate courts have repeatedly emphasized that we cannot look for implicit findings in a district court's general conclusions. See *Duran*, 56 Kan. App. 2d at 1271-75; see also *State v. Field*, No. 120,165, 2019 WL 2710174, at *5 (Kan. App. 2019) (unpublished opinion) (finding the district court did not meet the particularity requirement when it failed to explain how Field's failure to report jeopardized the public safety or his welfare). The district court's statements during the hearing focused on the evils and dangers of DUI generally, not whether public safety or Inchaurigo's welfare would be served by a 2- or 3-day jail sanction. In short, the district court's analysis in this case does not satisfy K.S.A. 2019 Supp. 22-3716(c)(7)(A).

We understand the district judge's frustration with Inchaurigo's repeated imbibing of alcohol in violation of the terms of his probation, especially after the judge's colloquies at sentencing and at each subsequent hearing on Inchaurigo's probation violations regarding the judge's experiences with DUI offenders. But merely reciting the defendant's

criminal history or opining about the dangers of a broad category of offenses is insufficient to revoke a person's probation based on K.S.A. 2019 Supp. 22-3716(c)(7)(A). See *Clapp*, 308 Kan. at 988-90; *Duran*, 56 Kan. App. 2d at 1274-77.

The district court's discretion to revoke Inchaurigo's probation was controlled by the language of K.S.A. 2019 Supp. 22-3716. Failing to make particularized findings under K.S.A. 2019 Supp. 22-3716(c)(7)(A) constitutes an abuse of that discretion requiring reversal. *Clapp*, 308 Kan. at 991; *Duran*, 56 Kan. App. 2d at 1276-77. We therefore reverse the district court's revocation of Inchaurigo's probation and remand for a new dispositional hearing in compliance with K.S.A. 2019 Supp. 22-3716(c). Because Inchaurigo stipulated to the underlying probation violations, the court on remand should consider the appropriate disposition in light of those violations.

Reversed and remanded with directions.