

NOT DESIGNATED FOR PUBLICATION

No. 125,513

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LARRY O. GARDNER JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed September 29, 2023. Affirmed in part, vacated in part, and remanded with directions.

Grace E. Tran, of Kansas Appellate Defender Office, for appellant.

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

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: Larry O. Gardner Jr. timely appeals from the district court's revocation of his probation and imposition of his underlying prison sentence. He argues the district court incorrectly announced the amount of good time credit he may be eligible to receive towards his sentence. He further argues the district court abused its discretion in revoking his probation, asserting a lesser sanction would have better served his welfare and the interests of the community. We agree we must remand for the district court to correct the amount of good time credit Gardner may be entitled to receive but affirm the

revocation of Gardner's probation as explained below. Thus, we affirm in part, vacate in part, and remand with directions.

FACTS

Pursuant to a plea agreement, Gardner pled guilty to one count of possession of marijuana with intent to distribute, a severity level 3 drug felony, for acts committed in August 2018. At sentencing in November 2020, the district court imposed an underlying prison term of 62 months' imprisonment with 36 months' postrelease supervision. The district court further stated Gardner was entitled to earn up to 15 percent good time credit toward his prison sentence. The district court granted Gardner's motion for dispositional departure and suspended his sentence to 36 months' probation.

Probation did not go well. In March 2022, a warrant was issued for Gardner's arrest, alleging he committed several new crimes: possession of marijuana; possession of drug paraphernalia; distribution of hallucinogens; driving under the influence (DUI); transporting an open container; and tampering with an ignition interlock device. The district court held bifurcated evidentiary hearings on the probation violation. Gardner waived his right to an evidentiary hearing on the allegations he committed a DUI, transported an open container, and tampered with an ignition interlock device. After hearing evidence on the remaining violations, the district court found Gardner had committed all violations alleged in the warrant. The district court revoked Gardner's probation and imposed his underlying prison sentence. Additional facts are set forth as necessary.

ANALYSIS

We have jurisdiction over Gardner's appeal.

The district court revoked Gardner's probation on July 19, 2022. Gardner filed a notice of appeal through his trial counsel on August 11, 2022. After his appeal was docketed, this court issued an order to show cause why the appeal should not be dismissed as untimely. See K.S.A. 2022 Supp. 22-3608(c) (14-day time limit to appeal from final judgment in criminal case). Gardner responded, indicating he asked his attorney to file a notice of appeal, but she did not timely do so. Included with his response is an affidavit from Gardner as well as correspondence between Gardner's trial counsel and appellate counsel. In this correspondence, Gardner's trial counsel admits she erroneously filed the notice of appeal within 14 days of receiving the journal entry, not 14 days from the revocation hearing. Gardner asserts that although his notice of appeal was untimely, he should be allowed to appeal out of time based on the third exception under *State v. Ortiz*, 230 Kan. 733, 736, 640 P.2d 1255 (1982) (defendant's attorney failed to timely file and perfect appeal).

In its response, the State indicates it has no reason to dispute the contents of Gardner's affidavit or the admission by his trial counsel she failed to timely file the notice of appeal. The State agrees Gardner should be allowed to pursue his appeal out of time under the third *Ortiz* exception. Because the material facts are not in dispute and reflect Gardner's trial counsel erred, we allow Gardner to appeal out of time.

Gardner's sentence must be corrected to reflect the proper good time credit for which he is eligible.

Gardner argues the district court erred at sentencing in stating he was eligible for up to 15 percent good time credit and indicating the same on the journal entry of

sentencing. The State agrees Gardner is entitled to up to 20 percent good time credit and his sentence should be corrected. Based on Gardner's conviction of a severity level 3 drug felony for acts committed in 2018, he is eligible to receive up to 20 percent good time credit toward his prison sentence. See K.S.A. 2018 Supp. 21-6821(b)(2)(C). Accordingly, the parties are correct that Gardner's sentence is illegal insofar as it "does not conform to the applicable statutory provision, either in character or punishment." K.S.A. 2022 Supp. 22-3504(c)(1).

Gardner asserts the matter should be remanded for resentencing with directions the district court must pronounce the correct maximum potential good time credit he is eligible to receive towards his prison sentence. The State asserts remand is unnecessary; rather, the appropriate remedy was for the district court to prepare a nunc pro tunc order reflecting the appropriate good time credit, which the district court has already done.

While the State's argument makes sense as a practical matter, K.S.A. 2022 Supp. 22-3424(a) provides that in a criminal case, "judgment shall be rendered and sentence imposed in open court." When a defendant's presumptive sentence is imprisonment, K.S.A. 2022 Supp. 21-6804(e)(2) requires the district court to pronounce the defendant's complete sentence on the record, which includes: (1) the defendant's prison sentence; (2) the maximum potential reduction of the prison sentence as a result of good time credit; and (3) the applicable period of postrelease supervision. The sentence pronounced from the bench controls. *State v. Brown*, 298 Kan. 1040, 1057, 318 P.3d 1005 (2014). A journal entry that imposes a sentence different from the one "pronounced from the bench is erroneous and must be corrected to reflect the actual sentence imposed." *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 (2012).

The State cites some older decisions from this court allowing certain aspects of sentencing to be corrected through nunc pro tunc journal entries. See *Brooks v. State*, 25 Kan. App. 2d 466, 468, 966 P.2d 686 (1998) (district court could correct sentence by

nunc pro tunc journal entry where consecutive sentences were required by law, which was not reflected in original journal entry); *State v. Callaway*, No. 76,249, 1997 WL 35435728, at *1 (Kan. App. 1997) (unpublished opinion) (ordering "an amended journal entry be entered with a true copy provided to the Secretary of Corrections reflecting Callaway's eligibility for up to 20% earned good time credits"). But in a more recent decision, the panel in *State v. Hester*, No. 123,762, 2022 WL 880379, at *2 (Kan. App. 2022) (unpublished opinion), found the appropriate remedy in this situation is to vacate the defendant's sentence and remand for resentencing so the correct potential good time credit can be pronounced from the bench. The reasoning in *Hester* is sound, and we will apply it here because the statutory requirements for imposing a prison sentence and our Supreme Court's longstanding precedent state a sentence pronounced from the bench controls, not the journal entry. See *Brown*, 298 Kan. at 1057.

Here, the appropriate remedy is to vacate the good time credit portion of Gardner's sentence and remand for resentencing with directions to the district court to pronounce the proper amount of good time credit for which Gardner may be eligible. However, we clarify the only portion of Gardner's sentence that is illegal is the amount of potential good time credit he may earn as pronounced at his original sentencing. No other aspect of Gardner's sentence is illegal; thus, the remainder of his underlying prison sentence may not be modified on remand. But the district court would still have the authority at resentencing to reinstate Gardner's probation in its discretion. See *State v. Jamerson*, 309 Kan. 211, 215, 433 P.3d 698 (2019) ("[T]his court has repeatedly held that the KSGA deprived district courts of the jurisdiction to modify sentences except to correct arithmetic or clerical errors, to consider or reconsider departures from presumptive sentences, or to modify sentences by reinstating previously revoked probations."); *State v. Guder*, 293 Kan. 763, 766-67, 267 P.3d 751 (2012) (on remand for resentencing, district court has no authority to modify sentences not vacated by appellate court).

The district court did not abuse its discretion by revoking Gardner's probation.

Gardner argues the district court abused its discretion by revoking his probation and imposing his underlying sentence. Specifically, he asserts imposing an intermediate sanction and continuing his probation would have better served his welfare and the interests of the community by allowing him to access rehabilitative services to address his issues with drugs and alcohol.

Once the district court has determined the defendant has violated the terms of probation, the decision to revoke probation lies in the discretion of the district court, subject to statutory limitations. 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. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). Gardner, 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).

It is undisputed Gardner violated his probation by committing new crimes. But Gardner identifies no error of fact or law underlying the district court's decision, and the district court acted within its statutory authority to revoke Gardner's probation without imposing any intermediate sanctions. See K.S.A. 2018 Supp. 22-3716(c)(8)(A). While reasonable persons could perhaps come to a different conclusion as to whether a lesser sanction would have been appropriate, the district court's decision was not such that no reasonable person would agree with it. Accordingly, Gardner has not met his burden to show an abuse of discretion by the district court in revoking his probation and imposing his underlying prison sentence.

Affirmed in part, vacated in part, and remanded with directions.