NOT DESIGNATED FOR PUBLICATION

No. 125,682

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

HEATHER A. LANKTON,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Sam S. Kepfield, of Hutchinson, 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: In this appeal of her probation revocation, Heather A. Lankton argues that the district court erred by imposing her jail sentence without first imposing intermediate sanctions. This case arises because of a plea bargain in which Lankton pled guilty to six misdemeanors in exchange for the State's dismissal of her felony charges. The district court sentenced Lankton to a suspended 54-month jail term with 12 months of probation. Soon after sentencing, the State alleged that Lankton violated the terms of probation by committing new crimes and failing to report to her probation officer. Following a hearing, the district court revoked Lankton's probation and imposed her jail

sentence. Lankton appeals the revocation of her probation, but a review of this record shows that the district court did not abuse its discretion in doing so. We affirm the revocation of Lankton's probation.

FACTS

Lankton pled guilty to three counts of domestic battery, a class B person misdemeanor, and three counts of criminal damage, a class A person misdemeanor, all occurring in October 2020. In exchange for her plea, the State dismissed the original charges of aggravated battery, a severity level 4 person felony; aggravated burglary, a severity level 7 person felony, and criminal restraint, a misdemeanor. The district court imposed the sentence recommended by both parties: a suspended 54-month jail term with 12 months of probation, with the standard terms of probation required.

Soon after, the State moved to revoke Lankton's probation based on her failure to report for her probation and the commission of new crimes. The State alleged that Lankton possessed controlled substances, marijuana, and drug paraphernalia. At the hearing to address the allegations, Lankton waived her right to an evidentiary hearing and stipulated to the facts alleged by the State. The district court concluded that the State had carried its burden to establish the facts supporting the allegations.

The district court considered the recommendations of Lankton's probation officer and the State to revoke probation and impose the jail sentence. Based on the allegations of the two probation violations, the benefit conferred to Lankton in the plea agreement, and the commission of new crimes, the district court revoked Lankton's probation and imposed her underlying sentence. Lankton timely filed her notice of appeal.

ANALYSIS

Did the district court err in revoking Lankton's probation?

Lankton argues that the district court erred by revoking her probation and imposing her underlying jail sentence.

Standard of review

Probation is an act of judicial leniency afforded to a defendant as a privilege rather than a right. *State v. Gary*, 282 Kan. 232, 237, 144 P.3d 634 (2006). Once a 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). A judicial action constitutes an abuse of discretion if it is: (1) arbitrary, fanciful, or unreasonable; (2) based on a legal error; or (3) based on a factual error. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party alleging an abuse of discretion has the burden of proving its existence. See *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

The probation revocation statute, K.S.A. 22-3716, through the years

Lankton argues that the statutory scheme for felony convictions applies to her case requiring the district court to impose intermediate sanctions before revoking probation and imposing her jail sentence. It is important to understand the history of K.S.A. 22-3716, which underwent many amendments over the last decade. Before 2013, district courts had broad discretion to impose various sanctions once established that a probation violation occurred. That said, the Legislature amended the statute and eliminated this wide discretion. See *State v. Clapp*, 308 Kan. 976, 981-82, 425 P.3d 605 (2018) (interpreting felony intermediate sanction provisions in 2014 version of statute). The new amendment provided that the first sanction for an established probation violation

available to a district court—other than modifying the conditions of probation—was a "quick dip" two- or three-day jail sanction. See K.S.A. 2018 Supp. 22-3716(c)(1)(B).

If another probation violation occurred after imposing the first sanction, the district court could then impose a 120- or 180-day sanction in prison. See K.S.A. 2018 Supp. 22-3716(c)(1)(C)-(D). Only after these two sanctions, and a later violation, could the district court revoke probation and impose the underlying prison sentence. See K.S.A. 2018 Supp. 22-3716(c)(1)(E).

Then another transformation of the statute in 2019 eliminated the 120- and 180-day sanctions. See K.S.A. 2019 Supp. 22-3716(c). Under that amendment, the district court could revoke probation only after the probationer serves a quick dip sanction for their first violation. See K.S.A. 2019 Supp. 22-3716(c)(1)(C). Throughout the changes, the Legislature allowed for a way to bypass the graduated sanction scheme altogether and revoke probation without imposing previous intermediate sanctions. See K.S.A. 2019 Supp. 22-3716(c)(7). This exception applies when a probationer commits a new crime while on probation. K.S.A. 2020 Supp. 22-3716(c)(7); see *State v. Wade*, No. 125,320, 2023 WL 3262444, at *3-4 (Kan. App. 2023) (unpublished opinion).

The district court has the power to revoke probation and impose the jail sentence without previously imposing intermediate sanctions if the underlying crime is a misdemeanor.

The discussion earlier, however, applies exclusively to offenders where the crime of conviction is a felony. For misdemeanors, a different section applies. Under the statute, if the crime of conviction was a misdemeanor and the court finds a violation is established, it may continue or modify probation, impose an intermediate jail sanction, or revoke probation and "require the defendant to serve the sentence imposed." K.S.A. 2020 Supp. 22-3716(b)(3)(B)(i)-(iii).

On the other hand, K.S.A. 2020 Supp. 22-3716(c)(1) states: "[I]f the original crime of conviction was a felony . . . and a violation is established, the court may impose the following sanctions: . . . ." K.S.A. 2020 Supp. 22-3716(b)(3)(A) also makes it clear: "[I]f the original crime of conviction was a felony . . . and a violation is established, the court may impose the violation sanctions as provided in (c)(1)." Thus, where the underlying crime is a misdemeanor, the district court has the power to revoke probation and impose the underlying sentence upon the first probation violation without previously imposing intermediate sanctions.

The misdemeanor sanction scheme applies here.

The applicable statute to this case is K.S.A. 2020 Supp. 22-3716 because Lankton committed her crimes in October 2020. Lankton argues that the district court abused its discretion by failing to impose intermediate sanctions before revoking probation under K.S.A. 2020 Supp. 22-3716(c). She cites *State v. Wilson*, 314 Kan. 517, 501 P.3d 885 (2022), and *Clapp*, 308 Kan. 976, to support her argument. But her reliance on K.S.A. 2020 Supp. 22-3716(c) as authority that an intermediate sanction is required before revocation is misplaced. While the State charged Lankton with felonies, she ultimately pled guilty to six misdemeanors as the result of a plea bargain. Lankton cites to cases and statutory text in her brief that apply to felony convictions. Her argument is undercut by her misdemeanor convictions because of K.S.A. 2020 Supp. 22-3716(b)(3)(B) applies.

Under the misdemeanor sanction scheme, the district court may impose various sanctions, including revoking probation and imposing the underlying jail sentence. K.S.A. 2020 Supp. 22-3716(b)(3)(B)(i)-(iii). So, the district court enjoys the discretion to choose the sanction that best responds to the probation violation. Here, the court chose to revoke Lankton's probation and impose her jail sentence given the violations of probation were new crimes and failure to report. These are both valid grounds for the district court

to revoke probation under the misdemeanor sanction scheme. Thus, the district court did not abuse its discretion in revoking Lankton's probation.

The district court's findings were supported by the record.

All probation violations must be established by a preponderance of the evidence. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). And 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).

At her probation revocation hearing, Lankton admitted to the allegations contained in the two warrants. One of those warrants alleged that Lankton possessed marijuana and drug paraphernalia, both of which are crimes in Kansas. See K.S.A. 2020 Supp. 21-5706(c)(1)(3); K.S.A. 2020 Supp. 21-5709(b)(2). The district court, based on Lankton's waiver and admission, found the allegations to be true. Because one of those allegations was for the commission of new crimes, the district court revoked Lankton's probation and imposed the underlying sentence.

Even if the felony sanction scheme applied, Lankton's argument is unconvincing.

Even if Lankton's underlying crimes were felonies, the district court nevertheless had authority to revoke her probation based on her admission to committing new crimes. Under K.S.A. 2020 Supp. 22-3716(c)(7)(C), the district court may revoke probation and impose the prison sentence if the offender commits a new felony or misdemeanor while on probation.

As pointed out by the State, the position taken by Lankton has received no support by panels of this court in *State v. Cooper*, No. 123,970, 2022 WL 188917, at *2 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 759 (2022), and *State v. Hunter*, No.

117,304, 2017 WL 6062922, at *2 (Kan. App. 2017) (unpublished opinion). Both *Hunter* and *Cooper* deal with issues substantially similar to Lankton's case. Both panels of this court cited to the section of K.S.A. 22-3716 dealing with misdemeanors rather than felonies given both defendants' underlying crimes were misdemeanors. The State also points out that Lankton's appellate counsel in the current case also represented Hunter and Cooper on appeal.

The district court did not abuse its discretion in revoking Lankton's probation.

The Legislature entrusted the district courts with broad discretion to hear probation violation allegations, make factual findings, and impose reasonable sanctions based on the statutory framework of K.S.A. 22-3716. The district court exercised this authority reasonably when it found that the State established that Lankton violated the terms of her probation. The decision to revoke her probation and impose the underlying sentence was reasonable given the statutory scheme and Lankton's own admission at the hearing. We will not disturb the district court's decision because there is no error of law or abuse of discretion.

Affirmed.