

NOT DESIGNATED FOR PUBLICATION

No. 125,730

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TITHUS JEROME COLE,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Submitted without oral argument. Opinion filed December 22, 2023. Affirmed and remanded with directions.

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

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., MALONE and WARNER, JJ.

WARNER, J.: Tithus Cole appeals the district court's revocation of his probation. He asserts that the district court violated his due-process right when it revoked his probation based on his conviction for a new crime he committed while on probation rather than on the allegations in the State's original probation-revocation motion. We affirm the district court's decision.

FACTUAL AND PROCEDURAL HISTORY

Cole pleaded guilty to possession of methamphetamine and possession of clonazepam. In June 2019, the district court sentenced him to a 30-month prison term, then suspended that sentence and placed Cole on 12 months of probation.

In December 2019, the State moved to revoke Cole's probation, alleging he had violated several conditions of his probation. Cole stipulated to each of those violations at a hearing a few months later. The district court imposed a 3-day jail sanction and extended his probation for 12 more months.

In April 2020, the State again moved to revoke Cole's probation, alleging he had not reported to his probation officer, made required payments, or submitted a scheduled urinalysis. A warrant was issued for house arrest (as this occurred at the outset of the COVID-19 pandemic) and executed in July 2020. Cole posted a bond the day after he was taken into custody, and the district court ordered him to wear a GPS ankle monitor.

Three days later, Cole removed the GPS monitor without authorization and traveled to Arkansas. The State moved to revoke Cole's bond, and a bench warrant was issued for his arrest. The State ultimately filed tampering charges against him in a separate criminal case.

Over a year later, Cole was in police custody in Pine Bluff, Arkansas, after being arrested for unrelated charges pending against him there. He was sentenced to seven years in prison, but, due to good behavior, only served 17 months. He was then transferred back to Johnson County, Kansas, after having been out of the state since July 2020.

In July 2022, Cole entered a plea deal for removing his GPS monitor. In exchange for a reduced charge, Cole agreed to plead guilty to attempted tampering, waive his preliminary hearing, and stipulate to violating his probation in this case.

The district court held a combined plea hearing for the attempted-tampering case and hearing on Cole's probation violation in this case. Before accepting Cole's guilty plea for attempted tampering, the court asked Cole if he had been given sufficient time to discuss "all aspects" of the attempted-tampering case and how the plea affected this case with his attorney. Cole said he had. The court emphasized that the plea deal required Cole to stipulate that this new conviction would violate the conditions of his probation as a new crime. Cole said he understood. Cole then pleaded guilty to attempted tampering with electronic monitoring equipment and stipulated to committing a new law violation while on probation.

A few months later, the district court held a combined hearing to sentence Cole in the attempted-tampering case and to determine the proper disposition for Cole's probation violation. Finding that this new conviction, considered along with Cole's multiple violations of his pretrial bond and probation, demonstrated that Cole was not amenable to probation, the court revoked his probation and ordered him to serve his original underlying 30-month prison sentence. Cole appeals.

DISCUSSION

Cole raises only one argument on appeal. Despite the stipulations in Cole's plea agreement and his express statements at the combined hearing in July 2022, Cole now argues that the district court erred in revoking his probation based on the attempted-tampering conviction. He asserts that the State's last motion to revoke his probation, filed in April 2020 (three months before he was ordered to wear and subsequently removed his GPS ankle bracelet), alleged different violations of his probation that did not include

tampering with his GPS ankle bracelet—failing to report, make payments, and submit to drug testing. Though he did not raise this deficiency to the district court, he now claims that he did not have adequate notice that his probation could be revoked based on a *different* violation—his new crime. He asserts that this lack of notice violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution.

A party generally cannot raise an issue—including a constitutional issue—for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). If a party fails to raise an issue below, "there must be an explanation why the issue is properly before the court." Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). Issues that require factual determinations by the district court must be made to the district court so that it is given the opportunity to make those findings. This preservation requirement allows the district court the opportunity to conduct an error-free proceeding and provides the appellate court—a court of review—with a record by which we can evaluate the district court's decision.

As we have noted, Cole never presented his notice argument to the district court. He nevertheless urges us to review it on appeal, stating that a party has a fundamental right, under due process, to receive notice of the potential bases for a probation violation. He broadly asserts that consideration of his claim is necessary to serve the ends of justice. He does not explain, however, how such a review is possible when the district court never had the opportunity to resolve the factual questions as to whether Cole was actually aware of the reason his probation was being revoked.

Cole's claim centers on the adequacy of his notice that the attempted-tampering conviction would be considered a probation violation in this case. The adequacy of this notice and the determination about whether the defendant had actual notice of the alleged violation are factual inquiries. Here, we are dubious of Cole's assertions since he

(1) agreed as part of his plea deal that the attempted-tampering conviction would be considered a probation violation in this case and (2) personally admitted on the record at the July 2022 hearing that he understood that reality. But because he never presented his notice argument to the district court, the court never had the opportunity to make specific findings to that effect. Without these findings, we cannot meaningfully review and consider his claim. We decline to consider Cole's fact-intensive argument for the first time on appeal.

Before closing, we observe that although the State alleged several other violations in its original motion requesting revocation, the only violation ultimately found by the district court was Cole's commission of a new crime. The court's journal entry, however, includes all the other violations alleged in the State's April 2020 motion. The journal entry must be corrected to reflect that Cole's attempted-tampering conviction was the only violation the court found. We thus remand this case so the district court may correct the journal entry through a nunc pro tunc order that accurately reflects its probation-revocation decision. Accord *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 (2012) ("The journal entry of sentencing can be corrected by a nunc pro tunc order so that it reflects the actual sentence pronounced from the bench, which was a legal sentence.").

Affirmed and remanded with directions.