

NOT DESIGNATED FOR PUBLICATION

No. 126,043

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TARYN L. NUSSER,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; DANIEL D. GILLIGAN, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

Submitted by the parties for summary disposition under K.S.A. 2022 Supp. 21-6820(g) and (h).

Before HILL, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: Taryn L. Nusser appeals the district court's decision revoking her probation and ordering her to serve her original sentence. We granted Nusser's motion for summary disposition under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). Finding no abuse of discretion, we affirm the district court's judgment.

Nusser pled guilty to one count of possession of methamphetamine with intent to sell, a severity level 2 drug felony. The offense occurred in September 2019. The district court sentenced Nusser to 100 months' imprisonment, but it granted her motion for a dispositional departure to probation for 36 months.

A few months after sentencing, the State moved to revoke Nusser's probation. The State alleged that Nusser failed to contact her probation officer, report to community corrections, or report to inpatient drug treatment. The State also alleged that Nusser committed the new crimes of identity theft, drug possession, and possession of drug paraphernalia in Marshall County. When the case proceeded to a hearing, the State announced that it was withdrawing the allegation that Nusser committed new crimes. Nusser admitted to the other violations. The district court ordered her to serve a 60-day jail sanction and extended her probation for 24 months.

About one year later, the State filed another motion to revoke Nusser's probation. The State alleged that Nusser had been charged with drug possession and possession of drug paraphernalia in Reno County. The State also alleged several other violations, including failure to report to community corrections, failure to engage in outpatient treatment, and several admissions of methamphetamine usage.

Nusser pled guilty to one of the charges (methamphetamine possession) in the Reno County case. As part of her plea agreement, she acknowledged that her guilty plea would constitute a violation of her probation. As a result, the district court found that Nusser violated the terms of her probation by committing a new crime. Noting that Nusser's initial sentence resulted from a dispositional departure, the district court revoked her probation and ordered her to serve her underlying sentence. The district court ordered the sentences in the two cases to run concurrent under the plea agreement.

On appeal, Nusser claims the district court "erred when it revoked her probation and abused its discretion by imposing her underlying prison sentence instead of reinstating her probation or modifying her sentence." The State has not responded.

The procedure for revoking a defendant's probation is governed by K.S.A. 2022 Supp. 22-3716. Generally, once the State has presented evidence of a violation of the

conditions of probation, the decision to revoke probation rests within the district court's sound discretion. *State v. Coleman*, 311 Kan 332, 334, 460 P.3d 828 (2020). A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ingram*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018). Nusser bears the burden of showing the district court abused its discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

Nusser admits that the district court had the legal authority to revoke her probation because she stipulated to committing a new crime while on probation. See K.S.A. 2019 Supp. 22-3716(c)(7)(C) (permitting revocation when a new crime is committed on probation). The district court was also empowered to revoke probation because probation was originally granted because of a dispositional departure. See K.S.A. 2019 Supp. 22-3716(c)(7)(B).

Nusser fails to show that the district court's decision to revoke her probation was arbitrary, fanciful, or unreasonable or that it was based on an error of fact or law. And as for the district court's decision to order Nusser to serve her original sentence without modification, the record reflects that Nusser did not request a modified sentence at the probation violation hearing or as part of the plea negotiations in the new case. Nusser asked the district court to reinstate her probation with community corrections, which the district court denied. But Nusser did not ask the district court to modify her original 100-month prison sentence in the probation case. K.S.A. 2022 Supp. 22-3716 does not require the district court to consider whether the defendant's sentence should be modified when the issue is not raised at the probation violation hearing. *State v. Reeves*, 54 Kan. App. 2d 644, 647, 403 P.3d 655 (2017).

Affirmed.