

NOT DESIGNATED FOR PUBLICATION

No. 126,087

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SEAN DUSTIN DAVIDSON,
Appellant.

MEMORANDUM OPINION

Appeal from Brown District Court; LAURA JOHNSON MCNISH, magistrate judge. Opinion filed September 29, 2023. Affirmed.

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

Before CLINE, P.J., WARNER and PICKERING, JJ.

PER CURIAM: Sean Davidson appeals the district court's order revoking his probation and ordering him to serve his underlying 45-month prison sentence. This court granted Davidson's request for summary disposition of his appeal under Kansas Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). We affirm the district court's judgment.

Davidson pleaded no contest to possession of marijuana and possession of methamphetamine. Before sentencing, Davidson requested a dispositional departure to probation or durational departure. He noted that he was remorseful for his conduct, willing to seek drug rehabilitation treatment, and amenable to probation.

At sentencing in December 2021, the district court granted Davidson's request for probation. The court ordered Davidson to serve 12 months of probation with underlying, consecutive sentences of 34 months' imprisonment for possession of methamphetamine and 11 months' imprisonment for possession of marijuana.

Unfortunately, Davidson was not successful on probation.

- In November 2022, Davidson admitted that he violated the terms of his probation by using drugs. This violation resulted in a 48-hour jail sanction.
- Less than a month later, Davidson's community corrections officer filed an affidavit alleging that Davidson had violated the terms of his probation again by failing to report for scheduled home and office visits, using marijuana and methamphetamine, and committing new crimes.

The district court held a hearing on the allegations in the officer's affidavit. Davidson admitted to violating his probation by failing to report to his community corrections officer and by continuing to use drugs. But he argued that some of his violations had already been addressed by the 48-hour sanction, and other violations should be excused because he was in a bad relationship. The court ultimately found that Davidson had violated the terms of his probation, revoked Davidson's probation, and ordered him to serve his underlying prison sentences. Davidson appeals.

Davidson does not dispute the district court's findings that he violated the terms of his probation. Instead, he argues the district court should have imposed another sanction and allowed him to remain on probation.

Probation is an act of judicial leniency afforded a defendant as a privilege rather than a right. *State v. Gary*, 282 Kan. 232, 237, 144 P.3d 634 (2006). Once a probation

violation has been established, the decision to modify the terms of probation or to revoke probation altogether is vested to the sound discretion of the district court, subject to the limitations outlined in K.S.A. 2022 Supp. 22-3716. See *State v. Brown*, 51 Kan. App. 2d 876, 879-80, 357 P.3d 296 (2015), *rev. denied* 304 Kan. 1018 (2016). A judicial action constitutes an abuse of discretion if it is arbitrary, fanciful, or unreasonable or if it is based on a legal or factual error. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Under K.S.A. 2022 Supp. 22-3716(c)(7)(B), the district court may revoke probation, regardless of whether it has previously imposed some lesser sanction, if the defendant's probation originally resulted from a dispositional departure. Davidson does not dispute that he was granted probation through a dispositional departure. But he argues that the district court abused its discretion by revoking his probation because sanctions remained a viable alternative and he was willing to undergo further drug treatment.

Davidson must demonstrate that the district court abused its discretion when it revoked his probation. See *State v. Rojas-Marceleno*, 295 Kan. 525, 531, 285 P.3d 361 (2012). He has not done so. Davidson was originally convicted of drug offenses—offenses that carried presumptive prison sentences. He continued to use drugs while on probation in violation of the terms of his release and had previously been sanctioned for this conduct. But the drug use continued, and he committed new crimes. Under these circumstances, Davidson has not shown the district court abused its discretion when it revoked his probation and ordered him to serve his underlying prison sentences.

Affirmed.