

NOT DESIGNATED FOR PUBLICATION

No. 126,586

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

JESSICA BURGE,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Phillips District Court; PAULA D. HOFAKER, magistrate judge. Opinion filed April 19, 2024. Affirmed.

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

Before ARNOLD-BURGER, C.J., HURST and COBLE, JJ.

HURST, J.: Jessica Burge appeals the district court's decision to revoke her probation and impose her underlying 98-month prison sentence. Burge filed a motion for summary disposition in lieu of briefs under Kansas Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State did not respond. This court granted Burge's motion and finds that the district court did not abuse its discretion in revoking Burge's probation. The district court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 2021, the State charged Jessica Burge with one count of unlawful distribution of methamphetamine, one count of unlawful possession of

methamphetamine, one count of no drug tax stamp, and one count of possession of drug paraphernalia. Pursuant to a plea agreement, Burge pled guilty to one count of unlawful distribution of methamphetamine in violation of K.S.A. 21-5705(a)(1) and (d)(3)(C), a severity level 2 drug felony. At sentencing in January 2022, the district court found Burge had a criminal history score of I based on the presentence investigation report. The district court then imposed a statutorily presumptive prison sentence of 98 months but suspended that sentence and granted Burge's motion for a dispositional departure, placing her on 36 months of supervised probation.

On May 24, 2023, about 24 months into her 36-month probation, the State moved to revoke Burge's probation based on the affidavit of her Community Corrections supervising officer. The affidavit supporting revocation alleged that Burge violated the terms and conditions of her probation by (1) failing to report to Community Corrections as directed; (2) failing to avoid such injurious or vicious habits as directed by the court or Community Corrections; (3) failing to refrain from illegally possessing and using methamphetamine and using alcohol; (4) being terminated from a sober living facility; (5) failing to comply with all treatment and counseling programs deemed necessary by her intensive supervision officer (ISO); and (6) failing to comply with imposed curfew. Burge voluntarily signed written violations admitting each of the alleged probation violations.

In June 2023 the district court held a probation revocation hearing where Burge stipulated to all the alleged probation violations as stated in the affidavit. Accordingly, the district court found that Burge violated the conditions of her probation. The State still called Burge's Community Corrections supervising officer who testified about the numerous opportunities Burge had to obtain drug addiction treatment before the State sought revocation. Burge also testified. She explained that she had an apartment in Norton but intended to go back to living at a sober living facility where she had spent

some time. She further testified that she had a support group at church and acknowledged her willingness to continue outpatient drug treatment.

The State claimed that although Burge had served three intermediate jail sanctions, the district court was not required to impose intermediate sanctions before revoking her probation because Burge was granted probation pursuant to a dispositional departure. The State emphasized Burge's inability to remain drug free and recommended that the district court revoke Burge's probation and impose her underlying sentence. Burge's counsel requested the district court impose a 60-day jail sanction based on her limited criminal history and her lack of risk to the public.

After considering the motion, affidavit, testimony, and recommendations from counsel, the district court revoked Burge's probation and imposed her underlying 98-month prison sentence. The district court stated, "So the Court finds then that Ms. Burge has been given opportunity to—to make a change. But she's failed to make a—a positive change in her life." The district court cited K.S.A. 22-3716(c)(7)(B) in its revocation order, noting that revocation was permitted because Burge's original sentence was the result of a dispositional departure.

Burge appeals.

#### DISCUSSION

On appeal, Burge claims that the district court abused its discretion in revoking her probation and imposing her underlying prison sentence. Before the district court may revoke probation, the State must establish by a preponderance of the evidence that the probationer violated the terms of probation. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). After the State establishes a probation violation, the 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); see also K.S.A. 22-3716(b) and (c) (requiring graduated sanctions before revocation in certain circumstances). Burge stipulated to the probation violations at the revocation hearing, and the court found that Burge violated the conditions of her probation.

If an offender is originally granted probation as a result of a dispositional departure pursuant to K.S.A. 21-6815, the district court may revoke that probation for any violation of the conditions of probation without first imposing an intermediate sanction. K.S.A. 22-3716(c)(7)(B). This court reviews a district court's revocation of an offender's probation for an abuse of discretion. *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020). A court abuses its discretion when its decision is (1) so arbitrary or fanciful that no reasonable person would agree with the decision; (2) based on an error of law; or (3) based on an error of fact such that substantial competent evidence does not support the factual findings. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017). Burge, as the party asserting an abuse of discretion, bears the burden of showing such abuse of discretion. See 305 Kan. at 868.

At sentencing, the district court granted Burge probation as a dispositional departure from a presumptive prison sentence. Burge had a criminal history score of I, which the district court explained placed Burge "in a sentencing range of either 92, 98, or 103 months in prison." The court heard testimony regarding Burge's motion for dispositional departure, and the district court found "substantial and compelling reasons to grant the motion for dispositional departure." The court hoped that by granting Burge probation she would be able to "deal with [her] addiction" and it "would promote [Burge's] reformation." As such, when faced with a motion to revoke Burge's probation, the district court was authorized to revoke her probation "without having previously imposed a sanction." See K.S.A. 22-3716(c)(7)(B). Accordingly, the district court's decision to revoke Burge's probation was not based on an error of law or fact.

This court then considers whether any reasonable person would agree with the district court's decision to revoke Burge's probation and impose her underlying prison sentence. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018). The sentencing court granted Burge a dispositional departure to probation to allow her a chance at reformation and to seek assistance with her substance abuse—yet the probation failed to achieve those goals. Burge had violated her probation on multiple occasions by possessing and using methamphetamine and had three short jail sanctions before the State moved to revoke her probation. Under these circumstances, this court cannot say that the district court's decision to revoke Burge's probation was unreasonable.

#### CONCLUSION

After receiving a dispositional departure to probation, Burge repeatedly violated the terms of her probation and failed to reform her behavior or refrain from illegal drug use. The district court did not abuse its discretion in revoking her probation and imposing her underlying 98-month prison sentence.

Affirmed.