

NOT DESIGNATED FOR PUBLICATION

No. 119,833

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ELI KENDREX,
Appellant.

MEMORANDUM OPINION

Appeal from Labette District Court; FRED W. JOHNSON, JR., judge. Opinion filed June 28, 2019.
Affirmed.

Submitted by the parties for summary disposition pursuant to K.S.A. 2018 Supp. 21-6820(g) and (h).

Before MALONE, P.J., LEBEN and POWELL, JJ.

POWELL, J.: Eli Kendrex appeals the district court's revocation of his probation and the imposition of a reduced sentence. We granted Kendrex's motion for summary disposition pursuant to Supreme Court Rule 7.041A (2019 Kan. S. Ct. R. 47). The State did not file a response. After a review of the record, we affirm.

Pursuant to a plea agreement with the State, Kendrex pled no contest to one count of nonresidential burglary, a severity level 7 nonperson felony. On March 7, 2016, the district court sentenced Kendrex to the presumptive sentence of 21 months in prison but placed him on probation from that sentence for a period of 24 months.

On July 7, 2016, Kendrex stipulated to violating his probation by failing to report; the district court extended his probation for 24 months and imposed a 2-day quick dip jail sanction. Not long after, on September 14, 2016, the State sought to revoke Kendrex's probation on the grounds that he had failed to report and failed to pay the required court costs. An affidavit outlining the violations was not submitted until March 21, 2017. An update to this affidavit was submitted on May 3, 2017, indicating that Kendrex had also been charged in a new case with aggravated assault and obstruction of official duty. At a probation violation hearing conducted on May 22, 2017, Kendrex stipulated to the violations; the district court once again extended his probation for 24 months and imposed a 60-day jail sanction.

On December 18, 2017, the State once again sought to revoke Kendrex's probation on the grounds of his failure to report and failure to pay court costs. The probation officer's report to the court explained that Kendrex's whereabouts were unknown and the efforts made to locate him were unsuccessful. At the probation violation hearing conducted on June 25, 2018, the parties announced to the court that they had reached an agreement with regard to disposition of the probation violations. In exchange for Kendrex's stipulation to the probation violations and agreement to have his probation revoked and sentence imposed, the State would recommend that Kendrex's prison sentence be reduced to 16 months. Kendrex stipulated to failing to report and paying court costs, and, as a result of those stipulations, the district court found Kendrex had absconded, revoked his probation, and imposed a reduced sentence of 16 months in prison.

Kendrex's sole argument on appeal is that the district court abused its discretion by revoking his probation and imposing a prison sentence. Once a probation violation has been established, the decision to revoke probation is within the sound discretion of the district court. See *State v. Skolaut*, 286 Kan. 219, 227-28, 182 P.3d 1231 (2008). Judicial discretion is abused if the action "(1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no

reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law . . . ; or (3) is based on an error of fact." *State v. Jones*, 306 Kan. 948, Syl. ¶ 7, 398 P.3d 856 (2017). Kendrex bears the burden to show an abuse of discretion by the district court. See *State v. Rojas-Marceleno*, 295 Kan. 525, 531, 285 P.3d 361 (2012).

A district court's discretion on whether to revoke probation is limited by intermediate sanctions as outlined in K.S.A. 2018 Supp. 22-3716. A district court is required to impose graduated intermediate sanctions before revoking an offender's probation. See K.S.A. 2018 Supp. 22-3716(c); *State v. Huckey*, 51 Kan. App. 2d 451, 454, 348 P.3d 997, *rev. denied* 302 Kan. 1015 (2015). Intermediate sanctions include a 2-day or 3-day sanction of confinement in a county jail, a 120-day prison sanction, or a 180-day prison sanction. K.S.A. 2018 Supp. 22-3716(c)(1)(B), (C), (D). Under these limitations, the district court may revoke probation and order a violator to serve the balance of his or her original sentence only after both a jail sanction and a prison sanction have been imposed. K.S.A. 2018 Supp. 22-3716(c)(1)(E). A 60-day jail sanction is not an intermediate sanction. See K.S.A. 2018 Supp. 22-3716(c)(11).

However, there are exceptions which permit a district court to revoke a defendant's probation without having previously imposed the statutorily required intermediate sanctions. One exception allows the district court to revoke probation if the offender commits a new crime while on probation; another is when the defendant absconds from supervision. See K.S.A. 2018 Supp. 22-3716(c)(8)(A), (B). However, simply failing to report to a supervising officer does not equate to absconding. See *Huckey*, 51 Kan. App. 2d at 456; see also *State v. Dooley*, 308 Kan. 641, Syl. ¶ 4, 423 P.3d 469 (2018) ("[T]he State must show, and the district court must find, that the probation violator engaged in some course of action [or inaction] with the conscious intent to hide from or otherwise evade the legal process.").

According to the record, it appears the district court was likely not entitled to revoke Kendrex's probation for three reasons: (1) not all the required intermediate sanctions had been imposed as a 60-day jail sanction does not constitute an intermediate sanction; (2) while Kendrex had committed new crimes while on probation, the district did not revoke probation at the time of those violations nor did it cite that as the reason for revoking probation in this instance; and (3) while the district court cited absconding as the reason for revocation, the State had not alleged that Kendrex had absconded; it merely alleged a failure to report, and Kendrex only stipulated to that charge.

This notwithstanding, Kendrex does not challenge the district court's absconding finding nor its authority to revoke his probation. Instead, Kendrex merely argues the district court abused its discretion in failing to give him an intermediate sanction. Consequently, any assertion the district lacked the authority to revoke Kendrex's probation has been abandoned. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) (issue not briefed deemed waived or abandoned). But even if Kendrex had challenged the district court's authority to revoke his probation, such a challenge would be unavailing as Kendrex *specifically agreed* to have his probation revoked and a lesser sentence imposed as part of a deal with the State. Kendrex cannot now challenge the district court's imposition of sentence when he has asked for such a result. See *State v. Verser*, 299 Kan. 776, 784, 326 P.3d 1046 (2014) (litigant may not invite error and then complain of such error on appeal). Therefore, we affirm the district court's decision to revoke Kendrex's probation and impose a reduced prison sentence.

Affirmed.