

NOT DESIGNATED FOR PUBLICATION

No. 124,672

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

DAIN MARSHALL BROWN,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Cloud District Court; KIM W. CUDNEY, judge. Opinion filed February 24, 2023.  
Reversed and remanded with directions.

*Jennifer C. Roth*, of Kansas Appellate Defender Office, for appellant.

*Robert A. Walsh*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: Dain M. Brown appeals the district court's revocation of his probation, arguing that the district court wrongly revoked his probation without first imposing an intermediate sanction. This court finds that the State failed to present sufficient evidence to establish by a preponderance of the evidence that Brown committed a new offense while on probation or that he absconded from probation. The district court therefore erred in revoking Brown's probation on those bases without first imposing an intermediate sanction as was required by the statutory scheme at the time. Moreover, because Brown's sentence was not the result of a dispositional departure under

K.S.A. 2018 Supp. 21-6815, that exception to intermediate sanctions is inapplicable here. The district court's revocation of Brown's probation is therefore reversed.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2019, Brown pled no contest to possession of methamphetamine, a severity level 5 felony, related to conduct that occurred in April 2019. See K.S.A. 2018 Supp. 21-5706. At sentencing, the district court determined that Brown had a criminal history score of D. Under the then-existing statutory scheme—commonly known as Senate Bill 123, codified at K.S.A. 2018 Supp. 21-6824—Brown's crime of conviction and criminal history score required that the district court sentence him to mandatory drug treatment. Despite automatically qualifying for mandatory drug treatment, Brown unnecessarily moved for a downward dispositional departure, seeking a sentence of probation with drug treatment, which the district court granted.

The district court's sentencing journal entry explained that it found substantial, compelling reasons to grant Brown's requested downward dispositional departure—even though it was not necessary to grant probation. The district court sentenced Brown to mandatory drug treatment for up to 18 months with an underlying prison term of 24 months. Brown completed the majority of his probation—almost 16 months—before the State moved to revoke his probation. The State alleged that Brown repeatedly violated the conditions of his probation, beginning within the first two months of his probation when he was discharged from the Serenity House drug treatment program for drug use. After his discharge, Brown completed a three-day detoxification at Central Kansas Foundation (CKF) and was allowed to return to Serenity House. Unfortunately, less than a month later Brown was again discharged from Serenity House and, in August 2020, was also evicted from Jayhawk House.

Compounding Brown's inability to successfully complete the drug treatment program at Serenity House, the State alleged that Brown failed to report for required drug testing on six different occasions. The State's revocation motion further alleged that between October and December 2020, Brown tested positive for methamphetamine and amphetamines three times, missed a required meeting with a supervision officer, and failed a curfew check. In mid-December 2020, Brown completed another stay at CKF and returned to Serenity House but then left that same day on December 17, 2020, and the State was unaware of his whereabouts as of that date. The State filed its motion to revoke Brown's probation three weeks later.

The court held an evidentiary hearing on December 1, 2021, at which Brown's intensive supervision officer (ISO) testified. Brown's ISO testified about the allegations in the State's motion and included additional details which form the basis for Brown's appeal. The ISO testified that Brown "essentially . . . absconded in December [2020]" and "during the time he was absconded he was up here in Concordia" and that a police officer emailed her to tell her that Brown "ran from the cops" in Cloud County. The ISO further testified that she thought Brown had received a misdemeanor charge in Cloud County for running from the police, and Brown was also later charged with possession of methamphetamine and drug paraphernalia in Saline County.

Brown testified that he violated the terms of his probation in many of the ways his ISO described but clarified that the Saline County charge was for possession of marijuana in municipal court, not methamphetamine or drug paraphernalia. He explained that after leaving Serenity House in December 2020, he "just never came back" and tried to find another job in Salina. Brown's attorney asked, "Um, but you—you admit that you absconded from—from probation?" to which Brown responded, "Yes, sir, I do admit to it."

The district court determined that Brown violated the terms of his probation, including that he accrued new charges in Saline and Cloud Counties, and that he absconded. The court revoked his probation and ordered him to serve his underlying sentence. The district court had not ordered Brown to serve any intermediate sanctions prior to revoking his probation.

The journal entry of probation revocation differed slightly from the district court's bench ruling. It provided that the court revoked Brown's probation because he absconded and his original sentence was the result of a dispositional departure. The district court did not mark the box for "committed new crime" as the reason for revocation.

Brown appealed.

#### DISCUSSION

Brown frames the issue on appeal as a constitutional violation of his due process rights for the district court revoking his probation without providing notice of the bases for its reason. However, he also challenges the district court's decision to revoke his probation without first imposing intermediate sanctions because he argues there was insufficient evidence that he committed a new crime while on probation or that he absconded. The doctrine of constitutional avoidance "strongly counsels against courts deciding a case on a constitutional question if it can be resolved in some other fashion." *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 554, 502 P.3d 89 (2022). Therefore, this court will first address the sufficiency of the evidence supporting the district court's decision to revoke Brown's probation.

This court reviews the district court's decision to revoke a defendant's probation for an abuse of discretion. A district court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of

fact. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). However, the State must establish that the probationer violated the terms of probation by a preponderance of the evidence before the district court may exercise its authority to revoke probation or institute some other sanction. See *State v. Dooley*, 308 Kan. 641, Syl. ¶ 3, 423 P.3d 469 (2018). Brown carries the burden of demonstrating that the district court abused its discretion in revoking his probation. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

Brown committed his crime of conviction in April 2019, and thus the sentencing laws in effect at that time apply to his sentence. See *State v. Hill*, 313 Kan. 1010, 1014, 492 P.3d 1190 (2021) ("A person convicted of a crime is sentenced in accordance with the sentencing provisions in effect at the time the crime was committed."). Under the statutory scheme in effect at that time, district courts generally must first impose intermediate sanctions on an offender who violates the terms of their probation before revoking probation. K.S.A. 2018 Supp. 22-3716(c)(1). However, in some circumstances, the district court can bypass intermediate sanctions. These circumstances include cases in which a probationer commits a new crime while on probation, absconds from supervision, or if probation was the result of a dispositional departure granted by the sentencing court under K.S.A. 2018 Supp. 21-6815. See K.S.A. 2018 Supp. 22-3716(c)(8)-(9). According to its oral ruling, the district court bypassed intermediate sanctions in this case after finding that Brown committed a new crime and absconded from supervision. However, the journal entry of probation revocation did not include the finding that Brown committed a new crime.

While there was some evidence from Brown's ISO that he committed a new crime in Saline and Cloud Counties—although Brown disputed the exact nature of the crime—there was no evidence that he committed the crime while still on probation.

Brown's probation was to last for up to 18 months, which meant that if not extended, the latest it could have terminated would have been in March 2021. The State filed its motion to revoke in January 2021. The hearing on the State's motion was held in December 2021. "Conduct occurring after the end of the probation term generally cannot serve as the basis of a probation violation." *State v. Skolaut*, 286 Kan. 219, Syl. ¶ 7, 182 P.3d 1231 (2008). Thus, the district court could not rely on Brown's conduct for allegations that he committed a new crime if it occurred between March 2021 and the date of the revocation hearing in December 2021. Because there was no evidence presented as to *when* the new crimes occurred, the district court committed an error of fact in finding that those crimes were committed while Brown was on probation. Accordingly, the district court's factual finding that Brown committed a new offense while on probation was not supported by substantial competent evidence, and the State failed to present sufficient evidence to establish by a preponderance of the evidence that Brown committed a new offense while on probation.

The district court also made the legal finding that Brown absconded from probation. Brown's ISO testified that Brown "absconded" in December 2020 by leaving the Serenity House and failing to report thereafter. At the revocation hearing, upon questioning from his own attorney, Brown admitted to "absconding" from probation but provided no other testimony.

However, as this court has noted many times, "[a]bsconding is more than just not reporting" during probation. *State v. Huckey*, 51 Kan. App. 2d 451, 456, 348 P.3d 997 (2015). To abscond is "to depart secretly or suddenly, especially to avoid arrest, prosecution, or service of process." 51 Kan. App. 2d 451, Syl. ¶ 5. While Brown stopped complying with some conditions of his probation—including the condition to report to his ISO—that alone is insufficient to constitute absconding. To establish that Brown had absconded, the State needed to present sufficient evidence and the district court had to have explicitly found that Brown's action or inaction, or patterns of violations, including

any inferences from those, show an intent to hide, avoid, or evade the probation supervision and associated legal processes. See *State v. Dooley*, 313 Kan. 815, 820, 491 P.3d 1250 (2021); *State v. Dooley*, 308 Kan. at 657.

The district court made no such specific finding here.

Brown's ISO believed that failure to report constituted absconding, as did the prosecutor who stated that Brown's missed drug tests and missed appointments was "absconding stuff." However, whether Brown absconded is a legal question for the court. And while Brown admitted to absconding, he provided no factual basis to support that legal conclusion. One could assume that his attorney had spoken to him about the meaning of absconding before his testimony, but neither Brown nor the State provided evidence that Brown intended to evade detection or avoid sanctions in those last two months of probation. Unlike the defendant in *State v. Elias*, No. 124,387, 2022 WL 17174483, at \*3-4 (Kan. App. 2022) (unpublished opinion), where a panel of this court found the defendant had absconded, Brown did not testify that he was avoiding reporting because he feared the possible repercussions if he reported. In fact, Brown spoke to his ISO on the phone at the end of October 2020—about four months before the end of his probation—regarding his need to stay employed to successfully complete his probation, and Brown requested a three-day jail sanction due to a positive drug test. His ISO did not impose a jail sanction after the call. While there is evidence that Brown failed several components of his supervision over the course of the 16 months of probation before the State sought revocation, the State failed to present substantial competent evidence that during the last two months of his probation he intended to evade detection. The State's motion to revoke probation identifies six incidents where Brown failed to report for drug testing, but all of those failures occurred prior to December 17, 2020, the date the State alleges Brown absconded from supervision. The State presented no evidence of efforts to reach Brown or Brown's efforts to avoid supervision other than his discharge from Serenity House and subsequent failure to present himself to his ISO. Accordingly, the

State failed to present substantial competent evidence to support the district court's legal conclusion that Brown acted with an intent to avoid legal process in those last two months of probation, and the district court therefore erred in revoking Brown's probation on that basis.

Although not included in the district court's ruling from the bench, the journal entry suggested that probation revocation was permissible in this case because Brown's sentence was the result of a dispositional departure granted pursuant to K.S.A. 2018 Supp. 21-6815. However, that is an error of fact. Brown's sentence was imposed pursuant to K.S.A. 2018 Supp. 21-6824, which required the district court to sentence Brown to treatment in a drug abuse treatment program for up to 18 months because Brown met certain risk-assessment levels. It is true that, because Brown's sentence fell in a border box, his presumptive sentence was prison. But the reason that Brown was on probation was not because of a dispositional departure granted pursuant to K.S.A. 2018 Supp. 21-6815, but rather because K.S.A. 2018 Supp. 21-6824 compelled a different result. Therefore, the district court cannot rely on this exception to revoke Brown's probation without first implementing intermediate sanctions.

#### CONCLUSION

Under the statutory scheme in effect at the time, the district court was required to impose intermediate sanctions on Brown prior to revoking his probation unless certain exceptions applied—including if Brown absconded or committed a new crime while on probation. The State failed to present sufficient evidence to establish by a preponderance of the evidence that Brown committed a new offense while on probation or that he absconded. The district court therefore erred in revoking Brown's probation on those bases. Moreover, because Brown's probation was not imposed as the result of a dispositional departure under K.S.A. 2018 Supp. 21-6815, that exception to intermediate sanctions is inapplicable here. The district court's revocation of Brown's probation is



therefore reversed, and this case is remanded for a new hearing. At that new hearing the district court must determine if sufficient evidence exists to support revocation of Brown's probation without first implementing an intermediate sanction, and it may alternatively determine if the State can present sufficient evidence that this issue is moot.

Reversed and remanded with directions.