No. 125,071

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DAVID LEE RALSTON JR.,
Appellant.

SYLLABUS BY THE COURT

Prosecutorial error can occur in the context of a probation violation hearing.

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Opinion filed May 5, 2023. Affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

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

COBLE, J.: David Lee Ralston Jr. appeals from the revocation of his probation. Ralston entered into a global plea agreement, pleading no contest to three charges—one felony and two misdemeanors—in three separate cases. In exchange for his plea, the State dismissed other charges and agreed not to oppose probation. The district court sentenced Ralston to a total of 40 months' imprisonment but granted his motion for a downward departure and imposed a 12-month probation period for all cases to be served concurrently. Ralston was later charged with new crimes and other probation violations and the State moved for revocation. Ralston stipulated to all violations, except one felony

charge which had been dismissed. The district court revoked Ralston's probation and imposed the original sentence of 40 months' imprisonment, denying Ralston's request for a modified sentence.

Ralston argues that the State committed prosecutorial error through improper statements made during the probation revocation hearing, which affected the district court's decision to impose the original prison sentence without modification. On our review, although we find the prosecutorial error rule does apply to this probation revocation proceeding, we find any error harmless. Because Ralston had committed new crimes during his probation period and he was previously granted probation as a dispositional departure, the district court's decision to revoke his probation was well within its discretion under K.S.A. 2018 Supp. 22-3716(c)(8)(A) and (c)(9)(B). The district court's ruling is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On August 24, 2020, Ralston pleaded no contest to one count of possession of methamphetamine, a felony, in case No. 19-CR-115; one misdemeanor count of domestic battery, in case No. 18-CR-229; and one misdemeanor count of theft, in case No. 17-CR-36.

Three months later, Ralston appeared for sentencing where the district court found his criminal history score to be A, and neither party objected. Ralston filed a motion for a dispositional departure to probation with an underlying sentence in the guideline range, which the State did not oppose. The district court imposed a standard 40 months' sentence on the felony charge and granted a dispositional departure to a probation term of 12 months. On the two remaining cases 17-CR-36 and 18-CR-229, the district court imposed a 12-month term of probation to run concurrent with the felony case.

Five months later, Ralston admitted to violating the terms of his probation by failing to report on four occasions and by using THC. The State moved to revoke Ralston's probation in all three cases. Due to continued delays, the probation violation hearing was postponed six times. In the meantime, the State filed addendums to the motion to revoke probation. Included in the fourth addendum to the motion to revoke probation was an affidavit from Scott Monninger, Ralston's supervising community corrections officer. The affidavit alleged these violations:

- Numerous failures to report to his supervising officer, and his last report was on April 7, 2021;
- Ralston tested positive for THC and methamphetamine multiple times;
- Ralston was unsuccessfully terminated from substance abuse treatment;
- Ralston was charged with driving while suspended twice, in February and April 2021, and in November 2021 was charged with driving while a habitual violator; and
- Ralston was charged with aggravated domestic battery in July 2021.

During the probation revocation hearing, Ralston stipulated to all violation allegations in the fourth addendum affidavit except for the aggravated domestic battery charge, which both parties had agreed to dismiss. The district court accepted the stipulation and found Ralston in violation of his probation terms.

Ralston asked the court for a modification of his sentence and at least one day before surrendering so that he could put his affairs in order. In support, Ralston argued that he had been struggling with methamphetamine and was forced to drive with a suspended license because he had to get to work. Ralston stated that he did what he had to do to provide for himself and that he had been paying his court costs to date.

The State argued that the original 40 months' prison sentence should be imposed. The State reminded the district court that Ralston's probation was the result of a downward dispositional departure, but even given that chance, Ralston failed to comply with the terms of probation. In support of the State's arguments, the prosecutor stated:

> "He has failed to report to his probation officer multiple times, hasn't seen his probation officer prior to these motions being filed since April of last year, so almost a year ago. When he was seen by his probation officer he tested positive for meth and marijuana. He had to do a two day jail sanction and showed up to the jail and was turned away because he blew a .089 on the Intoxilyzer. He's continued to violate the law by being convicted of two new driving while suspended cases. He was charged with an aggravated domestic battery. It was dismissed, but it wasn't dismissed because we didn't think it happened; it's because the victim was unable to be located and refused to cooperate. Clearly the underlying, some of the misdemeanor convictions, Judge, included a domestic battery. He failed to attend the batterer's intervention program that's created to try to prevent that behavior, and clearly his previous arrest shows that at least there was an indication that some of that's still going on."

During the hearing, Ralston's counsel objected to the State's comment that Ralston failed to report since April 2021. He stated that Ralston had reported, although infrequently, to his community corrections officer.

The district court revoked Ralston's probation and imposed the underlying prison sentence of 40 months without modification. The court noted that Ralston's sentence was originally a presumptive imprisonment case, and a departure motion was granted. Although the hearing transcript was silent on this point, the journal entry for the probation violation hearing also reflected that the probation was revoked because Ralston committed new crimes.

Ralston timely appeals.

ANALYSIS

Ralston argues on appeal that the prosecutor made improper statements of fact during the probation revocation hearing by referencing the aggravated domestic battery charge, noting he failed to attend batterer's intervention program, and arguing that Ralston had not reported to his probation officer since April 2021. He contends that these improper statements denied him a fair hearing on the requested sentencing modification.

Standard of Review

Although Ralston challenges the district court's decision to impose the underlying sentence after revoking his probation, which we would normally review under an abuse of discretion standard, he frames his appeal only as a prosecutorial error claim. The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. See *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019) (citing *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 [2016]). First, the appellate court examines whether the identified prosecutorial acts "fall outside the wide latitude afforded prosecutors" to pursue the State's case and try to obtain a conviction in a way that does not offend the defendant's right to a fair trial. 305 Kan. at 109. If the court determines there was an error, it then moves to consider whether the error "prejudiced the defendant's due process rights to a fair trial." 305 Kan. at 109.

Even if the prosecutor's actions were egregious, reversal of a criminal conviction or other district court order is not an appropriate sanction if the court determines the actions satisfy the constitutional harmlessness test from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). See *Blansett*, 309 Kan. at 412; *Sherman*, 305 Kan. at 109. This test means the prosecutorial error is harmless "'if the State can demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no

reasonable possibility that the error contributed to the [decision]."'" *Blansett*, 309 Kan. at 412 (quoting *Sherman*, 305 Kan. at 109). The statutory harmlessness test found in K.S.A. 2022 Supp. 60-261 also applies to prosecutorial error, but when analyzing both constitutional and non-constitutional error, appellate courts only need to address the higher standard of constitutional error. See *Sherman*, 305 Kan. at 109.

The prosecutorial error analysis is applicable to probation revocation hearings, but here, the errors were harmless.

At the outset, we note that Ralston's argument appears to be a novel one. To date, our court has not clearly applied the prosecutorial error standard in the context of a probation revocation hearing.

The prosecutorial error jurisprudence in Kansas "recognizes a prosecutor's conduct can implicate a criminal defendant's due process rights to a fair trial under the Fourteenth Amendment to the United States Constitution." *State v. Wilson*, 309 Kan. 67, 73, 431 P.3d 841 (2018.) Our Supreme Court's test for prosecutorial error, set forth in *Sherman*, clearly shows that criminal defendants have a constitutional right to a fair trial. 305 Kan. at 109.

But what about prosecutorial misstatements made outside the criminal trial context? A panel of this court applied the prosecutorial error analysis when reviewing a hearing on a motion to correct illegal sentence—a decision later upheld by our Supreme Court. *State v. Wilson*, No. 114,567, 2016 WL 7324427, at *4 (Kan. App. 2016) (unpublished opinion), *aff'd and remanded* 309 Kan. 67, 431 P.3d 841 (2018). The Court of Appeals panel explained it had "previously addressed claims of prosecutorial misconduct for statements made before a judge at the preliminary hearing and at sentencing." 2016 WL 7324427, at *4. The panel pointed to other opinions where our court addressed claims of prosecutorial misconduct for statements made during a

preliminary hearing and at sentencing. *Wilson*, 2016 WL 7324427, at *4 (citing *State v. Serrano-Garcia*, No. 103,651, 2011 WL 4357804, at *3-4 [Kan. App. 2011] [unpublished opinion] [sentencing]; *State v. Roland*, No. 101,879, 2010 WL 1078454, at *1-3 [Kan. App. 2010] [unpublished opinion] [sentencing]; *State v. Clelland*, No. 93,001, 2005 WL 1805250, at *3-5 [Kan. App. 2005] [unpublished opinion] [preliminary hearing]); see also *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021) (addressing a prosecutorial error claim related to the prosecutor's comments made during the sentencing phase of the trial).

In addition to the prosecutorial error analysis having been applied outside the trial context, it is clear that defendants have a constitutional due process right to a fair hearing before their probation is revoked. See *State v. Hurley*, 303 Kan. 575, 581, 363 P.3d 1095 (2016) ("[O]nce the privilege of probation has been bestowed upon a defendant, he or she acquires a conditional liberty interest which is subject to substantive and procedural due process limits on its revocation."). No doubt, the due process protections applied to a probationer are not as stringent as those that attach in a criminal trial to a jury or to a judge, given that the burden of proof on the State is to establish a probation violation by a preponderance of the evidence rather than guilty beyond a reasonable doubt as required at trial. See *State v. Lloyd*, 52 Kan. App. 2d 780, 783, 375 P.3d 1013 (2016) (stating the State's burden on a probation violation); K.S.A. 2022 Supp. 21-5108(a) ("In all criminal proceedings, the state has the burden to prove beyond a reasonable doubt that a defendant is guilty of a crime.").

Despite the differences in levels of proof, if we were to say that the prosecutorial error rule applies in trials but does not apply to probation revocation hearings, we would be condoning blatant misstatements of fact or law by the prosecution, without any impact on the district court's revocation decision. We would then leave, as the only remedy for such misstatements, a contempt sanction or an ethical complaint against the prosecutor, personally. But neither of these remedies cure a loss of liberty suffered by the defendant

whose probation is revoked. And the "remarkable responsibility" of a prosecutor to see that justice is done simply cannot end with, or be confined to, a conviction and sentencing. See *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 (2000) ("A prosecutor is a servant of the law and a representative of the people of Kansas [and] the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'") (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 [1935]).

A panel of this court recently stated:

> "Prosecutors have a duty to fairly state the law and the facts. See *State v. Tahah*, 302 Kan. 783, 791, 358 P.3d 819 (2015). The failure to do so amounts to error. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021). Although we commonly deal with prosecutorial error in closing arguments to juries, the rule applies to statements a prosecutor addresses directly to the district court. More generally, prosecutors—as representatives of the State in criminal cases—have a paramount duty to see that justice is done, rather than simply securing convictions or maximum sentences. *State v. Pabst*, 268 Kan. 501, Syl. ¶ 6, 996 P.2d 321 (2000) (overarching 'interest' of State, and its legal representative, in criminal prosecution 'is not that it shall win a case, but that justice shall be done'); see *Tahah*, 302 Kan. at 791." *State v. Jackson*, No. 124,540, 2023 WL 176079, at *2 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* February 13, 2023.

Although *Jackson* was, like other cases cited above, examining prosecutorial misconduct in the context of sentencing, we adopt its explanation of the broad duty of a prosecutor. This duty must likewise extend to probation revocation proceedings and candor in such proceedings. Consequently, a prosecutor is not permitted to argue facts outside the record or misstate facts in a probation revocation hearing, any more than he or she could in a jury trial or a sentencing hearing. And the record before the district court,

in this case, consisted only of the stipulated violations as outlined in the affidavits accompanying the motion for probation revocation.

For these reasons, we find the prosecutorial error rule necessarily applies to Ralston's claims, and we address each of the instances Ralston cites.

First, we address whether the prosecutor's statement regarding Ralston's failure to report "since April of last year . . . almost a year ago" rises to the level of error. The affidavit accompanying the 4th Addendum to the Motion to Revoke Probation in the record does specifically say that Ralston last reported on April 7, 2021—an assertion which, at first glance, supports the prosecutor's statement. However, the same affidavit notes that Ralston tested positive for various drugs on June 28, 2021, and he signed an admittance of substance use on September 30, 2021. Apparently, Ralston had some contact with his corrections officer for him to test and admit to drug use. Ralston's counsel, while disputing the prosecutor's statement, admitted that Ralston reported "infrequently" at best, which tracks the dates provided in the affidavit. At worst, the affidavit contained contradictory information, making the prosecutor's blanket statement inaccurate. Under these circumstances, though, given that Ralston's counsel agreed he reported irregularly, and that Ralston stipulated to the violations, the prosecutor's error did not deprive Ralston of a fair hearing, given that all parties essentially agreed he reported irregularly.

Next, when reviewing the prosecutor's comments related to the aggravated domestic battery charge, we also find prosecutorial error. The parties agreed the criminal charge was previously dismissed, so the State withdrew that ground as a basis for revocation. Effectively, then, the domestic battery charge was no longer an issue for the district court's consideration. But by reinjecting the issue into his argument, and in fact expanding on it by alluding to the reasoning behind the dismissed charge and the related

batterer's intervention program, the prosecutor injected highly prejudicial, yet entirely irrelevant, information into the hearing.

Finding prosecutorial error, we must then determine whether the error influenced the district court's decision to revoke Ralston's probation and deny his request for modification. We find it did not. The district court did not mention the domestic battery issue during the announcement of its decision to immediately revoke Ralston's probation. Instead, the district court reminded Ralston he had welcomed an exceptional "break" by receiving a departure sentence to probation in the first place—echoing an admonition the court delivered to Ralston at sentencing that any failures to abide by the terms and conditions of probation would be poorly received. The district court acknowledged Ralston's "extraordinary" criminal history, including the new charges. And the district court, when considering whether to allow Ralston to report to jail at a later date, reminded Ralston that when he was required to report to jail on an earlier sanction, he arrived at the jail intoxicated. On our review of the record, we are convinced beyond a reasonable doubt that the prosecutor's statements related to the dismissed domestic battery charge did not affect the outcome of Ralston's probation violation hearing.

Even setting aside the prosecutorial error, the district court's decision to impose the original sentence was within its sound discretion.

Despite the prosecutor's errors, the district court had sufficient legal grounds to invoke the prison sanction. Although Ralston does not outright challenge the district court's decision to revoke his probation, he contends that the court could have imposed a modified sentence after the probation revocation.

Generally, the appropriate disposition after the finding of a probation violation is governed by the version of the statute in existence at the time the offender committed the crime of conviction. *State v. Coleman*, 311 Kan. 332, 334-37, 460 P.3d 828 (2020). Since

Ralston committed his original offense in March 2019, K.S.A. 2018 Supp. 22-3716 governs. In this edition of the statute, a district court may bypass intermediate sanctions and revoke the offender's probation if the probation was originally granted as the result of a dispositional departure under K.S.A. 2018 Supp. 22-3716(c)(9)(B). Additionally, K.S.A. 2018 Supp. 22-3716(c)(8)(A) allows revocation without intermediate sanctions if the probationer commits a new crime while on probation. Once probation has been revoked, the district court may impose the original sentence or any lesser sentence. K.S.A. 2018 Supp. 22-3716(c)(1)(E).

An appellate court reviews the district court's decision to deny an offender's request for a lesser sentence upon the revocation of probation for an abuse of discretion. *State v. Reeves*, 54 Kan. App. 2d 644, Syl. ¶ 3, 403 P.3d 655 (2017). A district court abuses its discretion if its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The movant bears the burden of showing an abuse of discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

During the probation revocation hearing, both Ralston's counsel and the State conceded that his probation resulted from a dispositional departure. The district court noted in its ruling that it had granted the departure motion. And Ralston stipulated to violating all the probation terms stated in the State's fourth addendum to the motion to revoke probation except for the aggravated domestic battery charge. That stipulation included that Ralston had committed other crimes—driving while suspended—while on probation.

Based on these stipulations, the district court's basis for the revocation of probation was neither legally nor factually erroneous. And, under these circumstances, we cannot say the district court acted unreasonably when it revoked Ralston's probation and imposed the underlying sentencing. The district court's decision to impose the

original underlying sentence was within its sound discretion under K.S.A. 2018 Supp. 22-3716(c)(1)(E), (c)(8)(A), and (c)(9)(B).

Affirmed.