

NOT DESIGNATED FOR PUBLICATION

Nos. 125,134
125,135

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CLIFFORD ALLEN PARKINS,
Appellant.

MEMORANDUM OPINION

Appeal from Barton District Court; CAREY L. HIPPI, judge. Opinion filed May 26, 2023. Affirmed in part and dismissed in part.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., CLINE and HURST, JJ.

PER CURIAM: In this consolidated appeal Clifford Allen Parkins challenges the district court's decision revoking his probation and requiring him to serve his modified underlying prison sentences. On appeal, Parkins contends the State failed to present sufficient evidence to establish that he violated the terms of his probation. He also contends that the district court erred in ordering him to register under the Kansas Offender Registration Act (KORA) in his underlying criminal cases. Finally, he contends that the KORA violates the First Amendment to the United States Constitution. For the reasons stated in this opinion, we affirm in part and dismiss in part.

FACTS

On July 9, 2019, Parkins pled guilty to one count of distribution of a controlled substance causing great bodily harm and one count of possession of marijuana. Before accepting his plea, the district court informed Parkins that his distribution conviction would trigger a duty to register as an offender under KORA for 15 years. Parkins responded that he understood he would need to register under KORA if found guilty.

In pleading guilty to the charge of distribution of a controlled substance causing great bodily harm, Parkins admitted that he provided the victim with drugs that resulted in a condition requiring her hospitalization. The State proffered a supporting affidavit—to which Parkins did not object—stating that the victim bought what she thought were oxycodone pills from Parkins. Unfortunately, after taking one of the pills—which was later determined to contain fentanyl—the victim stopped breathing.

After accepting Parkins' plea and finding him guilty, the district court provided him with a written "NOTICE OF DUTY TO REGISTER." Although the presentence investigation (PSI) report did not show that Parkins had a duty to register, the State pointed out at the sentencing hearing that Parkins was required to register under K.S.A. 2019 Supp. 22-4902(f)(2). The district court agreed and ordered Parkins to register as a drug offender. The district court then found substantial and compelling reasons to grant Parkins a dispositional departure and placed him on probation for 36 months with an underlying prison sentence of 44 months.

On September 18, 2020, Parkins pled guilty to one count of distribution of methamphetamine in a separate case. In exchange for Parkins' guilty plea, the State agreed not to oppose Parkins' motion for a dispositional departure to probation to be supervised by community corrections. The district court accepted his plea and found Parkins to be guilty. The PSI report showed that lifetime registration would be required

under KORA. At sentencing, the district court again granted Parkins a dispositional departure and placed him on probation for 36 months with an underlying prison sentence of 123 months to run consecutive to the sentence in the 2019 case. The district court also ordered Parkins to lifetime registration under KORA.

On February 11, 2022, the State moved to revoke Parkins' probation in both cases. Specifically, the State alleged that Parkins did not report to his probation officer as required on two occasions. The State further alleged that Parkins had committed a new crime by not registering his change or termination of address and his change or termination of employment as required by KORA. The district court held an evidentiary hearing on April 11, 2022, at which Parkins appeared in person and by counsel.

At the probation revocation hearing, the State presented the testimony of four witnesses to support its motions to revoke. Although Parkins did not present any evidence or testimony, the district court gave him an opportunity to speak and respond to the State's allegations. Parkins admitted that he went to his grandfather's funeral in Wichita and then decided to stay there to help his parents with his grandfather's personal belongings.

Barton County Sheriff's Deputy Brandon Taylor testified at the hearing that he performed an annual check on Parkins at his registered residence on January 18, 2022. According to Deputy Taylor, he saw a door hanger on the handle of the front door of the residence that is used to inform registered offenders that they need to call law enforcement to verify that they are still living at their registered address. Deputy Taylor also testified that no one answered the door when he knocked and that he did not find anyone there when he "spot-checked" the residence several times in the following days. In addition, the deputy testified that it did not look like any vehicle traffic had been at the residence.

Deputy Taylor further testified that on January 28, 2022, he called Parkins' registered employer, Ivan Prieto of Twisted Metal Polishing, and was told that Parkins had not been working there since prior to the new year. Prieto informed the deputy that Parkins told him he was not going to continue working because he needed to turn himself in on outstanding warrants. Deputy Taylor additionally testified that Prieto told him that his in-laws owned the home that Parkins had given as his registered address, but that he had not lived in the house since prior to the new year.

The State also called Prieto, who testified that Parkins "used to" work for him. Although Prieto could not remember the date on which Parkins had last worked for him, he was sure it was prior to the new year. He testified that Parkins told him that he would not be working due to some personal issues. Prieto also testified that he would hire Parkins back in the future. Prieto indicated that he remembered law enforcement asking about Parkins, but he could not recall the specific details.

In addition, Prieto confirmed that the house that Parkins gave as his registered address was owned by his in-laws. He could not remember with certainty when Parkins stopped living there, but he thought it was around the time of Parkins' last day working for him. Prieto testified that he would not have mailed Parkins' last check to that address because he knew that "[Parkins] wasn't there anymore."

The State also called Natasha Beneke, who handles offender registration for the Barton County Sheriff's Office, to testify. She testified that offenders must register in person every three months and to report any changes of address or employment within three days. On February 9, 2022, Parkins registered his new address as the county jail after turning himself into custody on his outstanding warrants. She also testified that Parkins continued to claim to be employed by Twisted Metal Polishing.

Finally, Nathan Shattuck testified that he was assigned to supervise Parkins during his probation. According to Shattuck, Parkins was required to report four times a month. Shattuck testified that Parkins missed two appointments with him in October 2021. However, he did report on November 1, 2021. Shattuck indicated that although Parkins was scheduled to report on November 8, 2021, he did not do so. Parkins testified that at the November 1 appointment, he had given Parkins permission to attend his grandfather's funeral in Wichita over the weekend with the understanding that he would return to Great Bend on the following Monday. Shattuck did not hear from Parkins again until he left a message on February 9, 2022, saying that he was going to turn himself in on the outstanding arrest warrants.

After considering the evidence presented by the State, the statement given by Parkins, and the arguments of counsel, the district court revoked Parkins' probation and ordered him to serve his modified underlying sentences. In reaching this decision, the district court found that Parkins had violated the terms of his probation by not reporting to his probation officer and by committing a new crime. In particular, the district court determined that the State had proven by a preponderance of the evidence that Parkins had violated KORA by failing to report his change or termination of his registered address as well as his change or termination of his registered employment.

In deciding to require Parkins to serve his modified prison sentences the district court found that Parkins had already received multiple intermediate sanctions for prior probation violations. These sanctions included a 2-day quick dip in November 2019, a 60-day jail sanction in November 2020, and a 60-day internal sanction in August 2021. Ultimately, the district court ordered Parkins to serve his original 44-month sentence in the 2019 case and a consecutive modified 100-month sentence in the 2020 case.

Thereafter, Parkins filed a timely notice of appeal in each case and—because both cases involve the same issues—we consolidated them for the purposes of this appeal.

ANALYSIS

Commission of New Offense

On appeal, Parkins challenges the sufficiency of the evidence supporting the district court's finding that he violated the terms of his probation. Although the initial decision to impose probation is an act of grace by the district court, a probationer may not have his or her probation revoked unless the State shows that the probationer has violated one of more of the conditions of probation by a preponderance of the evidence. *State v. Hurley*, 303 Kan. 575, 581, 363 P.3d 1095 (2016). "A preponderance of the evidence is established when the evidence demonstrates a fact is more probably true than not true." *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016); see also *In re Estate of Moore*, 310 Kan. 557, 565, 448 P.3d 425 (2019).

We review a district court's factual findings supporting its conclusion that a probation violation occurred for substantial competent evidence. *State v. Lyon*, 58 Kan. App. 2d 474, 478, 471 P.3d 716 (2020). In deciding whether there is substantial competent evidence to support a district court's decision, we review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have come to the same conclusion as the fact-finder below. *State v. Colson*, 312 Kan. 739, 753, 480 P.3d 167 (2021). In doing so, we do not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). However, to the extent that our review involves the interpretation of statutes, the issue presents a question of law over which we have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

Here, Parkins argues that the State did not prove that he committed the new crime of violating KORA by not updating his registration with Barton County within three business days of changing or terminating his registered residence as well as by changing

or terminating his registered employment. K.S.A. 2022 Supp. 22-4905 sets out the duties an offender must perform to stay compliant under KORA. Material to this appeal, K.S.A. 2022 Supp. 22-4905(h) requires offenders to "register in person upon any commencement, change or termination of residence location, [or] employment status . . . within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas bureau of investigation."

Under KORA, "residence" is defined as "a particular and definable place where an individual resides" and offenders may have more than one residence for KORA purposes. K.S.A. 2022 Supp. 22-4902(k). "Reside" means "to stay, sleep or maintain with regularity or temporarily one's person and property in a particular place" excluding places where an offender is incarcerated. K.S.A. 2022 Supp. 22-4902(j). A person is also presumed to live where they stay, sleep, or maintain "the offender's person for three or more consecutive days or parts of days, or for ten or more nonconsecutive days in a period of 30 consecutive days." K.S.A. 2022 Supp. 22-4902(j). Finally, the "registering law enforcement agency" means the "sheriff's office or tribal police department responsible for registering an offender." K.S.A. 2022 Supp. 22-4902(n).

As discussed above, the State presented four witnesses at the evidentiary hearing in support of its motions to revoke Parkins' probation. Deputy Taylor testified about his unsuccessful attempts to find Parkins at his registered address as well as his investigation regarding Parkins' residence and employment. Likewise, Parkins' former employer testified that he had stopped working for him and had moved out of his registered residence prior to January 1, 2022. Beneke testified that Parkins did not report either a change in his registered address or his registered employment prior to February 9, 2022. On that date, Parkins was incarcerated, and his new address was registered as the Barton County Jail. Finally, Parkins' probation officer testified about his interactions with him as well as his failure to report for a significant amount of time. When viewed in the light

most favorable to the State, we find that there is substantial competent evidence in the record to show by a preponderance of the evidence that Parkins violated the terms of his probation including his failure to comply with the statutory provisions set forth in K.S.A. 2022 Supp. 22-4905(h).

Parkins argues that even if he was required to register while he was in Wichita, KORA would allow him to register in Sedgwick County rather than Barton County. Parkins suggests that KORA gives an offender a choice regarding whether to report a change in residence or employment between the current county of residence or the county in which the offender last registered. As such, Parkins asserts that the State did not meet its burden of proof that he violated KORA.

We find that Parkins' argument conflicts with the plain language of K.S.A. 2022 Supp. 22-4905(h). As set forth above, the statute expressly requires a registered offender to "register in person . . . within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies *where last registered* and provide written notice to the Kansas bureau of investigation." (Emphasis added.) K.S.A. 2022 Supp. 22-4905(h). As a result, KORA required Parkins to update his registration in Barton County, and his argument to the contrary fails.

Parkins also argues that he never actually changed or terminated his employment. He points us to his former employer's testimony that he would hire him again once he was released from custody. Parkins likens his time away from his employment at Twisted Metal Polishing to a "sabbatical or extended vacation." However, we find no evidence in the record to show that he took a sabbatical or vacation. Rather, his former employer testified that Parkins had not worked at Twisted Metal Polishing since sometime prior to January 1, 2022. Although his former employer also testified that he would hire Parkins back in the future, this does not mean that he was still employed by Twisted Metal

Polishing. In fact, the evidence—when viewed in a light most favorable to the State—shows the opposite.

Finally, it is important to recognize that Parkins' violation of a new crime was not the only probation violation found by the district court. In addition, the district court found that Parkins had violated his probation by failing to report to his probation officer as directed in violation of the terms of his probation. Although Parkins acknowledges that he did not report to his probation officer as required, he asserts that these were merely "technical violations" that are not significant. Even though Parkins may take his failure to report to his probation officer lightly, a reasonable person could view these violations to be significant. This is especially true in light of Parkins' previous violations of the terms of his probation.

A review of the record reveals that the district court granted probation to Parkins in these cases even though he was facing presumptive prison sentences. Since the time he was first placed on probation, Parkins has repeatedly violated the terms of his probation and has received intermediate sanctions. The district court noted the earlier sanctions imposed prior to deciding to revoke Parkins' probation. Even then, the district court modified Parkins' underlying sentences downward. As such, even if we found that the State did not prove the KORA violation—which we do not—the district court still had sufficient grounds to justify its decision to revoke Parkins' probation and to require him to serve his modified underlying sentences. See *State v. Grossman*, 45 Kan. App. 2d 420, 428, 248 P.3d 776 (2011) (when the district court relies on one valid ground to revoke probation, it does not matter if another ground was invalid).

Once the State proved one or more probation violations by a preponderance of the evidence, the decision to revoke Parkins' probation fell within the district court's sound discretion. See *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). Our review of the record confirms that the district court weighed the credibility of the witnesses

presented by the State and found by a preponderance of the evidence that Parkins violated K.S.A. 2022 Supp. 22-4905(h). In addition to finding that he had committed a new crime, the district court also found that Parkins violated the terms of his probation by not reporting to his probation officer as directed. Viewing the evidence in the light most favorable to the State, we conclude that a rational fact-finder could have determined that Parkins violated the terms of his probation and that he should serve his modified sentences.

Challenge to KORA Registration

For the first time on appeal, Parkins contends that the district court erred in ordering him to register in the 2019 case and, as such, also erred in ordering lifetime registration in the 2020 case. Even though Parkins acknowledges that he did not raise the issue below, he asks us to review this issue because it primarily involves a question of law on proved or admitted facts. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). In response, the State contends that Parkins not only failed to raise this issue before the district court but also waived his right to challenge the orders to register because he did not raise the issue in a direct appeal from either of his convictions.

Whether appellate jurisdiction exists is a question of law over which appellate courts exercise unlimited review. *State v. Lundberg*, 310 Kan. 165, 170, 445 P.3d 1113 (2019). The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Kansas courts have judicial power to hear matters over which they have jurisdiction. That jurisdiction derives from Article 3, sections 1, 3, and 6 of the Kansas Constitution. *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019). Subject to certain exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken in the manner prescribed by statutes. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016). When the record discloses a lack of jurisdiction, we must dismiss the appeal. *State v. Ehrlich*, 286 Kan. 923, Syl. ¶ 2, 189 P.3d 491 (2008).

Parkins does not dispute that he did not challenge either of the orders to register in a direct appeal. Although Parkins was ordered to register in both the 2019 and 2020 cases, he did not file this appeal—or raise this issue—until 2022. Of course, this was after his probation was revoked. As a general rule, an appeal from the revocation of probation is limited to issues relating to that revocation and issues relating to the original conviction, sentence, or related orders are not usually considered. *Wilkerson v. State*, 38 Kan. App. 2d 732, 734, 171 P.3d 671 (2007) (issues relating to conviction or underlying sentence should not be considered in appeal of probation revocation); see *State v. Bailey*, 315 Kan. 794, 799, 803, 510 P.3d 1160 (2022) (res judicata applies to issues previously raised and those that could have been raised but were not raised). Consequently, because Parkins did not file a direct appeal from either of the orders to register under KORA entered by the district court in his underlying criminal cases, we dismiss this part of Parkins' appeal for lack of appellate jurisdiction.

Constitutionality of KORA

The final issue presented by Parkins on appeal is whether the provisions of KORA—specifically K.S.A. 2022 Supp. 22-4902 and K.S.A. 2022 Supp. 22-4906(b)(1)—are unconstitutional because they violate the compelled speech doctrine in violation of the First Amendment to the Constitution of the United States. Once again, Parkins raises this issue for the first time on appeal. Regardless, Parkins invites us to address this issue because it allegedly involves a question of law on proved or admitted facts and the claim is necessary to prevent the denial of fundamental rights. See *Allen*, 314 Kan. at 283.

As several panels of this court have previously found, it is not prudential to address a constitutional challenge to KORA when the issue was not presented to the district court for consideration. See, e.g., *State v. Pearson*, No. 125,033, 2023 WL 2194306, at *1-2 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March

20, 2023; *State v. Jones*, No. 124,174, 2023 WL 119911, at *5-6 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* February 6, 2023; *State v. Ford*, No. 124,236, 2023 WL 1878583 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March 13, 2023. Although we note that the panel in *State v. Masterson*, No. 124,257, 2022 WL 3692859, at 3-4 (Kan. App. 2022) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022), addressed a constitutionality challenge to KORA even though it was raised for the first time on appeal and assuming the provisions of KORA compel speech, it ultimately determined that the provisions of the act are narrowly tailored to promote a compelling government interest.

Here, not only did Parkins fail to raise this issue before the district court, but he also failed to timely challenge the orders requiring him to register under KORA by way of a direct appeal in either of the underlying criminal cases. Because Parkins did not challenge his duty to register by way of direct appeal, we will not address the issue in this probation revocation appeal. Accordingly, we also dismiss Parkins' constitutional challenge to KORA for lack of appellate jurisdiction.

Affirmed in part and dismissed in part.