

NOT DESIGNATED FOR PUBLICATION

No. 125,142

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

JOSE SAUL TORRES JR.,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Barton District Court; CAREY L. HIPPE, judge. Opinion filed September 29, 2023.  
Affirmed.

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

*Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before HILL, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Jose Saul Torres Jr. appeals the district court's revocation of his probation and imposition of his underlying 154-month prison sentence, raising three issues. He argues the district court lacked jurisdiction, violated his due process rights, and abused its discretion by revoking Torres' probation. For the reasons set forth below, we find no error and affirm the district court.

## FACTUAL AND PROCEDURAL BACKGROUND

Torres was convicted in 2017 of aggravated battery of his girlfriend (now wife) in conjunction with a plea agreement under which he was sentenced to 154 months in prison but granted a dispositional departure and placed on probation for 36 months.

Torres had mixed success on probation. He completed tasks including a substance-abuse program, a batterers-intervention-program assessment, and employment services. But he also struggled with violations. In August 2019, after Torres admitted using methamphetamine, the district court found that he violated probation and imposed a 60-day jail sanction. In 2020, Torres again admitted to using methamphetamine at least twice and failed to report to his probation officer multiple times. He served a 30-day jail sanction that year.

In October 2020, Torres' probation officer filed an affidavit stating that Torres had again violated his probation by failing to report. The district court issued an arrest warrant based on this affidavit the same day.

Police arrested Torres on the warrant in early February 2021 at his mother-in-law's house. They also executed a search warrant there, finding 4 grams of methamphetamine, other drugs, and drug paraphernalia in the garage, along with a gun in a car parked at the house. Torres did not live at the house but often spent time in the garage with his wife. Police had seen Torres driving the car where police found the gun, and it did not belong to Torres' mother-in-law.

Based on the search, the State charged Torres with several new crimes, including possession with intent to distribute methamphetamine, criminal possession of a weapon, and other drug-related crimes. The State also separately filed two other drug-related cases against Torres based on conduct unrelated to this search and not at issue here.

A few days after the State filed these charges, Torres' 36-month probation term expired. Less than a week later, the State amended its October 2020 affidavit to include allegations related to the new charges. The State alleged that Torres violated his condition not to illegally possess, use, or traffic in drugs based on the drugs found in his mother-in-law's house. The State also alleged that Torres violated his condition to obey the law based on the charges in the two unrelated cases.

An evidentiary hearing on the alleged probation violations was held in May 2021. Before the hearing, Torres admitted to a technical violation of his probation for failing to report to his probation officer. And while he acknowledged he had been charged with new crimes reflected in the amended affidavit, he denied committing any new crime.

The district court observed, "[J]ust from my past experience it's my belief that the State generally is wanting to move forward and actually prove the new crime—that a new crime was committed and the specifics of that." The prosecutor confirmed that was the case but clarified it would proceed only on the allegations related to the search of Torres' mother-in-law's house, not his two other new cases. Additional discussion before the hearing started reflects the State initially believed Torres was subject to revocation for any violation but ultimately concluded that in the absence of evidence of a new crime, Torres might still be subject to graduated sanctions before his probation could be revoked. The record reflects the prosecutor advised the court, "[T]he State wants to put on evidence of a new crime at the end of the day. And now that I've thought about it, I do think it's probably the best that we do ask for—the Court for that finding." After some further discussion, the court stated, "That's what I needed to know was whether or not the State was wishing to move forward. I think [the State does] have the right to move forward with the allegation that a new crime was committed."

The district court then confirmed with Torres that he was admitting to failing to report to his probation officer and that new charges were filed but he was denying that a new crime was committed. The court accepted Torres' admission and proceeded to hold a hearing on whether a new crime had been committed. The State presented evidence about the search and the drugs, paraphernalia, and gun that the police discovered. Based on this evidence, the district court found that Torres violated his probation by committing new crimes, including possessing drugs. The court then revoked Torres' probation and imposed his underlying 154-month prison sentence. Torres appeals.

#### ANALYSIS

Torres challenges his probation revocation on three grounds. First, he argues that the district court violated his due-process rights by revoking his probation for new crimes when the State's affidavit categorized the conduct at issue—possessing the drugs in his mother-in-law's garage—as violating the condition not to illegally possess drugs, not the condition to obey the law. In other words, Torres claims he received defective notice of his alleged violations. Next, he asserts that the court lacked jurisdiction to revoke his probation because the State did not file its amended affidavit alleging Torres committed new crimes until after his probation term expired. Finally, Torres asserts the district court abused its discretion in revoking probation, rather than imposing a lesser sanction.

1. *The district court had jurisdiction to revoke Torres' probation.*

Though Torres argues his jurisdictional issue second, as an "in the alternative" argument, jurisdiction is a threshold issue, so we address it first. Torres did not raise the issue below, but parties can raise an issue of subject-matter jurisdiction for the first time on appeal. *Sandate v. Kansas Dept. of Revenue*, 58 Kan. App. 2d 450, 452, 471 P.3d 700 (2020). Appellate courts also must question jurisdiction on their own initiative. *State v. Berreth*, 294 Kan. 98, 117, 273 P.3d 752 (2012).

When a defendant is on probation, the district court may issue a warrant for the defendant's arrest for violating a condition of probation. K.S.A. 2022 Supp. 22-3716(a). The court has up to 30 days after the end of the probation term to issue such warrant. K.S.A. 2022 Supp. 22-3716(e). These provisions are jurisdictional. See *State v. Cisneros*, 36 Kan. App. 2d 901, 903, 147 P.3d 880 (2006).

"[R]evocation may occur after probation ends as long as a warrant, petition, or show cause order has been filed prior to or within 30 days after the expiration of the probationary term." *State v. Skolaut*, 286 Kan. 219, 231, 182 P.3d 1231 (2008). In other words, a court can revoke probation after the probation term ends if revocation proceedings were properly initiated during the probationary term or within 30 days after it ended. *State v. Darkis*, 314 Kan. 809, 813, 502 P.3d 1045 (2022).

When revocation proceedings are properly initiated, "[t]he actual revocation need not take place within the term of probation, as long as it occurs within a reasonable time thereafter." *State v. Williams*, 20 Kan. App. 2d 142, 148, 884 P.2d 743 (1994); see *State v. Bennett*, 36 Kan. App. 2d 381, 385, 138 P.3d 1284 (2006) ("Kansas law allows the revocation of probation after the term of revocation expires if the proceedings were instituted during the term of probation and revocation occurs within a reasonable time thereafter.").

This is true even when the State amends a revocation request and adds new allegations after the probation term has expired—provided such an amendment is reasonable. *Williams*, 20 Kan. App. 2d at 150. An amendment is reasonable when "the amended allegations were unknown or could not reasonably have been known when a timely filing is made, as long as there is no unnecessary delay before the filing of the amended allegations, and the actual revocation hearing is promptly held." 20 Kan. App. 2d at 150 (finding nine-month delay in filing amended motion to be reasonable); see also

*State v. Davis*, No. 120,645, 2020 WL 962100, at \*2-5 (Kan. App.) (unpublished opinion) (discussing and applying *Williams* and related cases), *rev. denied* 312 Kan. 895 (2020).

In October 2020, Torres' probation officer filed an affidavit alleging Torres violated his probation, and the district court issued an arrest warrant. Torres was arrested on the warrant on February 10, 2021—while still on probation—and the search yielded drugs in his mother-in-law's garage and a weapon in a car that had been driven by Torres. New criminal charges related to the drugs and gun found in the search were filed on February 19, 2021. A first appearance on the probation violation was held on February 22, 2021, and Torres' probation ended the next day, February 23. Six days later, on March 1, Torres' probation officer filed the amended affidavit adding allegations related to the drugs and gun. The district court then held the revocation hearing on May 4, 2021.

Torres likens this case to *Darkis*, in which the Kansas Supreme Court found that the district court lacked authority to revoke the defendant's probation because "no action was taken to initiate proceedings that would result in the court issuing a warrant" within 30 days after the probation term ended. 314 Kan. at 813. But here, the State had filed an affidavit—and the district court had issued a warrant—before Torres' probation term ended. The State then promptly amended the affidavit after the new allegations surfaced. *Darkis* is distinguishable.

Torres also asserts that this court should not follow *Williams*, implying that it clashes with K.S.A. 22-3716's plain language. But nothing in K.S.A. 22-3716 prohibits the State from amending an affidavit soon after a probation term expires to include the new violations that occur after the original affidavit is filed, but during the time a defendant is still on probation. This court has also continued to apply *Williams* over the past 30 years, and the Legislature has not amended K.S.A. 21-3716 in any manner inconsistent with the *Williams* holding. Finally, Torres cites no appellate case which is

critical of the reasonableness standard established in *Williams*, and that standard continues to be applied. See, e.g., *Davis*, 2020 WL 962100, at \*2-5. We see no reason why *Williams* should not apply to this case.

The timeline of events in this case complies with Kansas law. The State initiated revocation proceedings—and the district court issued a warrant—while Torres was still on probation. And while the State filed an amended affidavit after the probation term expired, this action was reasonable because the State could not have known about the new alleged violations—which occurred during the probation term—because they had not yet occurred when the initial affidavit was filed. Nor was there any significant delay in filing the amended affidavit—about three weeks after the new alleged violations occurred—or in holding the revocation hearing—two months after the State filed the amended affidavit. Thus, filing the amended affidavit after the probation term expired was reasonable and did not deprive the district court of jurisdiction. We find the district court had jurisdiction to revoke Torres' probation.

2. *The district court did not violate Torres' right to due process.*

Torres argues that the district court violated his due-process rights by revoking his probation for committing a new crime when the conduct at issue was listed in the affidavit as a violation of the condition not to illegally possess drugs, rather than the condition to obey the law.

Torres concedes he did not raise this issue below. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) ("Generally, an appellate court does not address issues for the first time on appeal."). This court has discretion whether to consider the issue. Torres argues the court should because the issue raises "a question of law arising on proved or admitted facts and is finally determinative of the case," and consideration is necessary to prevent the denial of fundamental rights. 314 Kan. at 283. The State concedes that the

issue implicates fundamental rights and that other panels have considered it on that basis. The issue is thus teed up for review.

Probationers have certain due-process rights including written notice of claimed probation violations, disclosure of the evidence of each violation, and the opportunity to have an evidentiary hearing. *State v. Hurley*, 303 Kan. 575, 582, 363 P.3d 1095 (2016); see *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). Kansas' probation-revocation statute, K.S.A. 22-3716, satisfies these constitutional requirements. *Hurley*, 303 Kan. at 582. Under that statute, when a probationer has been arrested for an alleged violation, his or her probation officer "shall submit in writing a report showing in what manner the defendant has violated the conditions of" probation. K.S.A. 2022 Supp. 22-3716(b)(1).

But a probationer's right to notice has limits. "[D]ue process does not require the State to assert that a probationer committed a new crime when giving notice of alleged probation violations"—even when the district ultimately revokes probation for that reason. *State v. Miner*, No. 122,372, 2021 WL 401282, at \*5 (Kan. App.) (unpublished opinion) (citing *State v. McGill*, 51 Kan. App. 2d 92, 97, 340 P.3d 515 [2015]), *rev. denied* 314 Kan. 858 (2021). In *Miner*, the State alleged that the defendant violated his probation by engaging in "'assaultive behavior'" and being "'in possession of a firearm.'" 2021 WL 401282, at \*1. The district court later found the defendant had committed the new crime of making a false information. This court found that the phrases in the warrant, along with references to police reports and incident dates, provided sufficient notice that the State was alleging the defendant had violated his probation by committing a new crime. 2021 WL 401282, at \*5.

Here, Torres' probation included conditions that he:

- "1. Obey all federal and state laws, municipal and county ordinances," and



- "10. Not illegally possess, use, or traffic in any controlled substance, narcotics or other drugs."

When the State filed its amended affidavit alleging new probation violations, Torres had recently been charged with crimes in three separate cases—each including charges for distribution or possession with intent to distribute heroin or methamphetamine. The amended affidavit stated that two of these new cases showed that Torres violated condition No. 1—to obey the law. The affidavit then stated that the third case—stemming from the search of his mother-in-law's house—violated condition No. 10. At the violation hearing, the State chose to proceed only on the third case, so that is the evidence from which the district found Torres had committed a new crime.

This process satisfied due-process requirements. The substance of the affidavit was clear that the State was seeking to revoke Torres' probation based on his alleged conduct that spawned charges in three new cases. At the later hearing, the State proceeded only on the conduct from one of these cases—including illegally possessing the methamphetamine found on Torres' mother-in-law's property. Possessing methamphetamine is a crime, and the amended affidavit listed the associated case number, alleged offense date, and all charges. That is, it "show[ed] in what manner the defendant has violated the conditions of" probation—by, at a minimum, illegally possessing drugs. See K.S.A. 2022 Supp. 22-3716(b)(1).

Torres thus had notice that the allegations at issue involved committing new crimes. How the State labeled the allegations in an affidavit does not change the factual allegations made by the State, and Torres does not explain how he was deprived from presenting a defense. Possessing methamphetamine violates both the condition to obey the law and the condition not to illegally possess drugs. That the affidavit alleged the conduct at issue violated the latter condition did not prohibit the district court from revoking probation for a new crime. Torres complains that the district court sua sponte

transformed a technical violation into a "substantive" violation without providing him proper notice. Torres misunderstands the difference between technical and substantive violations. "An act that violates probation conditions but isn't otherwise unlawful is a technical violation, while an act that violates probation conditions but is otherwise unlawful is a substantive violation." *State v. Brown*, 51 Kan. App. 2d 876, 880, 357 P.3d 296 (2015), *rev. denied* 304 Kan. 1018 (2016). A violation for illegally possessing methamphetamine or unlawfully possessing a weapon necessarily encompasses a violation for not obeying the law.

Furthermore, as detailed earlier in this opinion, before the hearing started the State gave clear notice that it intended to prove Torres committed a new crime and ask that his probation be revoked. The district court accepted Torres' waiver of his right to have a hearing on technical violations in the amended affidavit. The only purpose of the hearing on the single remaining allegation was to determine whether Torres had committed a new crime. Torres raised no objection or complaint when he acknowledged he was "going to deny that a new crime was committed," and then he proceeded to a hearing on that allegation. We find the district court did not violate Torres' right to notice when it found he violated probation by committing a new crime.

Torres relies on *State v. Scott*, No. 115,432, 2017 WL 2210442, at \*4-5 (Kan. App. 2017) (unpublished opinion), in which this court found a probationer's notice rights were violated when the State alleged Scott was "under the influence of an unknown substance" but the district court found he had misused his prescription drug. This court noted that "[b]ecause the State failed to plead this misuse in the probation violation warrant," the district court could not use it as a basis to revoke probation. 2017 WL 2210442, at \*5. The notice was defective because it affected the defendant's ability to defend against the State's allegations; his defense was that he appeared under the influence because he had taken a valid prescription, and the district court then "'moved the goal posts'" by finding a violation on that basis. 2017 WL 2210442, at \*5.

Torres' situation is different. The State's amended affidavit alleged that Torres violated his probation based on his series of new charges, all of which, if true, were new crimes. The district court revoked his probation on that basis. It never "moved the goal posts" by misleading him into an improper defense. From the affidavit, it was clear that Torres would have to defend against the allegation that he possessed the drugs found in his mother-in-law's garage. Indeed, he presented that defense at the evidentiary hearing. *Scott* is thus distinguishable. See *State v. Keith*, No. 122,456, 2021 WL 2387240, at \*3 (Kan. App.) (unpublished opinion) (distinguishing *Scott* on related grounds), *rev. denied* 314 Kan. 857 (2021); *Miner*, 2021 WL 401282, at \*4 (same).

Finally, even if we were to determine there was a due process error, it was harmless. See *Hurley*, 303 Kan. at 583-84 (applying constitutional harmless-error standard, under which the State must show beyond a reasonable doubt that the error did not affect the outcome). Under Torres' argument, the State would have complied with due process if the amended affidavit read: "This is in violation of condition #1" rather than "This is in violation of condition #10." But, the substantive allegations—and thus Torres' defense—would have remained unchanged. A different labeling would not have led to a finding that Torres did not possess the drugs or weapon found during the search.

Torres argues that the district court lacked authority to revoke his probation and would have been required to impose intermediate sanctions in the absence of a finding that he committed a new crime. But this misstates the proper harmless inquiry. Instead, the question is "whether the outcome would have been different had he received written notice of the alleged violation." *State v. Amador*, No. 123,584, 2022 WL 655851, at \*5 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 758 (2022). The answer is no because whether the affidavit said "#1" or "#10," the substance of the allegations would have remained the same, as would the evidence presented at the violation hearing, Torres' defense, and the district court's decision based on that evidence. The district court did not

violate Torres' due-process rights when it revoked his probation for committing a new crime.

3. *The district court did not abuse its discretion in revoking Torres' probation.*

Torres next argues that it was unreasonable to revoke his probation. Once there is an established violation, the decision to revoke probation is subject to review for an abuse of discretion. *State v. Gumfory*, 281 Kan. 1168, 1170, 135 P.3d 1191 (2006). A court abuses its discretion when its decision is unreasonable or based on a legal or factual error. *State v. Waller*, 299 Kan. 707, 722, 328 P.3d 1111 (2014). Appellate courts do not reweigh evidence, assess witness credibility, or resolve evidentiary conflicts. *State v. Talkington*, 301 Kan. 453, Syl. ¶ 3, 345 P.3d 258 (2015).

Torres argues it was unreasonable to revoke his probation and impose the underlying 154-month prison term given his success in other aspects of probation. For example, he notes that when the State issued its initial affidavit, he had nearly completed all three years of his probation, including tasks like a batterers-intervention program and employment services. But this was all evidence the district court considered and weighed when making its decision. Torres asks this court to reweigh the evidence, which is not this court's role. Given the finding that Torres committed a new crime by possessing methamphetamine and a gun, his admission to failing to report to a last-chance meeting with his probation officer, and his previous drug-related jail sanctions, the district court's decision to revoke his probation was not unreasonable.

Affirmed.