

NOT DESIGNATED FOR PUBLICATION

No. 125,275

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW THOMAS McDONALD,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Submitted without oral argument. Opinion filed December 22, 2023. Affirmed in part, reversed in part, and remanded with directions.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., GARDNER and HURST, JJ.

WARNER, J.: Matthew McDonald appeals the district court's revocation of his probation in two consolidated cases. Everyone agrees that the probation term in one of McDonald's cases had already expired, so the court did not have the ability to revoke his probation there. But McDonald has not shown the court abused its discretion when it revoked his probation in the other case and has not demonstrated that his attorney provided constitutionally deficient representation that affected the district court's decision. We thus reverse the revocation of McDonald's probation in the first case and affirm the revocation in the second.

FACTUAL AND PROCEDURAL BACKGROUND

McDonald was convicted of criminal possession of a weapon and theft in two separate cases. At a joint sentencing hearing in August 2019, the district court imposed an 8-month prison sentence for the criminal-possession conviction and a 32-month prison sentence for the theft conviction, to run consecutive. The court then granted a dispositional departure and ordered McDonald to serve two years of probation without clarifying the specific probation duration for either conviction.

In July 2021, with only one month of probation remaining, McDonald was charged with a new crime. He later pleaded guilty to one count of criminal threat, and the State moved to revoke McDonald's probation based on his commission of this new offense.

At a hearing on the State's motion, McDonald admitted that his commission of a criminal threat violated the terms of his probation. The State urged the court to revoke McDonald's probation and impose the underlying prison sentences for his original convictions. McDonald's counsel explained that the parties had "addressed [the reasons why McDonald should be granted probation] in the plea [agreement]" and thus "respectfully request[ed] the court follow the plea." McDonald asked the court for leniency, emphasizing that he was 24 days away from successfully completing his probation term.

After hearing the parties' arguments, the district court revoked McDonald's probation and ordered him to serve the consecutive sentences in his criminal-possession and theft cases, resulting in a controlling 40-month prison sentence. McDonald appeals.

DISCUSSION

McDonald challenges the district court's revocation in three ways. He first asserts the district court erred when it revoked his probation in the criminal-possession case, as the maximum probationary term for that offense had already expired. Next, he claims that the district court abused its discretion when it revoked his probation in the theft case, especially since he was so close to successfully completing his two years of probation. Finally, he argues that his attorney's comments at the hearing—broadly referencing the plea agreement without providing any context or explanation—resulted essentially in an abdication of the attorney's role and undermined the fairness of the proceeding.

As we explain in this opinion, we agree—and the State concedes—that the district court erred when it revoked McDonald's probation in the criminal-possession case. But McDonald has not apprised us of any error in the revocation of his probation for his theft conviction.

1. *The district court erred when it revoked McDonald's probation for his conviction of criminal possession of a weapon.*

McDonald challenges the district court's order revoking his probation and imposing the underlying 8-month prison sentence in the criminal possession of a weapon case. He argues—and the State concedes—that the district court lacked jurisdiction to revoke his probation in that case because the respective probation term had already expired. This conviction—a severity level 8 nonperson felony—carried a statutory probation term of 18 months. K.S.A. 2017 Supp. 21-6608(c)(4). Consequently, this probation term, and its underlying prison sentence, expired by operation of law once McDonald had completed 18 months of probation. See *Baker v. State*, 56 Kan. App. 2d 335, 429 P.3d 240, *rev. denied* 308 Kan. 1596 (2018).

By the time McDonald committed the criminal-threat offense in 2021, he had completed 23 months of probation. Thus, the district court did not have authority to revoke McDonald's probation—nor impose the underlying prison sentence—for the criminal-possession offense. We thus reverse the district court's order imposing the 8-month prison sentence in that case and remand for an order clarifying that McDonald has served the entirety of his sentence for criminal possession of a weapon.

2. *The district court did not abuse its discretion when it revoked McDonald's probation in the theft case.*

McDonald next argues that the district court erred when it revoked his probation in the theft case, asserting it should have allowed him to continue serving probation instead of ordering him to serve his underlying prison sentence.

In cases where a person admits to a probation violation, the decision whether to revoke probation "rests within the sound discretion of the district court." *State v. McFeeters*, 52 Kan. App. 2d 45, 47, 362 P.3d 603 (2015). The degree of discretion a district court may exercise varies based on the nature of the question before it. While the statutory framework generally requires a district court to impose graduated sanctions, limiting its discretion in some instances, those limitations do not apply here because McDonald committed a new offense. See *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015); *State v. Ardry*, 295 Kan. 733, 736, 286 P.3d 207 (2012). A district court has broad discretion to determine whether someone should remain on probation after they have committed a new crime. See K.S.A. 2017 Supp. 22-3716(c)(8)(A).

A court abuses its discretion if no one would agree with its decision or if its decision is based on an error of law or fact. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). The party asserting an abuse of discretion—here, McDonald—must show that such abuse occurred. 315 Kan. at 328.

McDonald has not identified a legal or factual error committed by the district court. Instead, he argues only that the court's decision to revoke his probation was unreasonable considering how close he was to completing his original probation term. Thus, according to McDonald, the district court abused its discretion because it should have implemented intermediate sanctions or modified the terms of his probation instead of revoking it outright.

McDonald concedes that he committed a criminal threat when he was on probation. While we can appreciate his frustration with being so close to completing his probation term when the State moved to revoke it, we can understand the district court's actions. Though he had spent almost two years under supervision, McDonald committed a new felony while he was on probation; thus we, like the district court, question whether probation was appropriate and effective for McDonald. Even if we might have imposed a different sanction if we were in the district court's place, we do not find its ruling to be inherently unreasonable. McDonald has not shown the court erred when it revoked his probation in the theft case and ordered him to serve his underlying 32-month prison sentence.

3. *McDonald has not shown that his attorney's representation affected the district court's revocation decision.*

In his final claim on appeal, McDonald argues that his attorney provided constitutionally defective representation during his probation revocation hearing. He asserts that his attorney—Scott Poor—effectively abandoned his role when Poor did not affirmatively argue against revoking McDonald's probation but simply asked the district court to follow the plea agreement.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of an attorney. See U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A person asserting the denial of that right must show that his or her attorney's performance was constitutionally deficient and that this deficiency prejudiced the person so as to deprive him or her of a fair trial. 466 U.S. at 687; *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting the *Strickland* approach in Kansas). Put another way, this prejudice inquiry requires a person to show "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012).

In general, both these inquiries—the reasonableness of the representation and the effect of that representation on the outcome of the proceeding—are highly fact-dependent. The State correctly points out that McDonald never questioned the effectiveness of Poor's representation before the district court. Because McDonald has raised this claim for the first time on appeal, the district court never had the opportunity to consider McDonald's argument or make an evidentiary record that we could review. These reasons illustrate why appellate courts are generally loath to consider claims of ineffective assistance of counsel that have not been litigated at the district court. See *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

McDonald acknowledges these procedural deficiencies. But he asserts that no further factual development is necessary. Instead of seeking an evidentiary hearing to assess Poor's representation and its effect under *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986), he argues that the record in this case conclusively demonstrates that Poor effectively abandoned his role as McDonald's attorney at the revocation hearing by making no argument beyond his reference to the plea agreement. McDonald thus asserts that this circumstance is similar to the facts underlying *United States v. Cronin*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), when the Supreme Court

of the United States presumed prejudice when a defendant had been effectively left without representation at a critical stage in the proceedings.

We do not find this argument persuasive. Although McDonald's counsel could have provided a more compelling discussion of why McDonald should be allowed to remain on probation, it cannot be said that McDonald was wholly without representation at that hearing. Rather, the effectiveness of Poor's representation must be reviewed under the *Strickland* analysis, which starts from a presumption that an attorney has acted reasonably in representing his or her client. See *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014).

And even if we were to presume that Poor's commentary at the hearing was deficient, McDonald does not explain how that deficient representation affected the district court's decision to revoke his probation. Indeed, McDonald himself argued the very points he now claims Poor should have raised—that McDonald had already completed most of his probation before committing the criminal-threat offense. The district court revoked his probation after considering this argument. Thus, McDonald has not shown that Poor's representation affected the outcome of his case.

Affirmed in part, reversed in part, and remanded with directions.