

NOT DESIGNATED FOR PUBLICATION

No. 125,502

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CODY BOLES,
Appellant.

MEMORANDUM OPINION

Appeal from Wilson District Court; DAVID WILLIAM ROGERS, judge. Opinion filed March 31, 2023. Reversed and remanded with directions.

Submitted by the parties for summary disposition pursuant to K.S.A. 2022 Supp. 21-6820(g) and (h).

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

PER CURIAM: Cody Boles appeals the revocation of his probation. We granted Bole's motion for summary disposition pursuant to Supreme Court Rule 7.041A (2022 Kan. S. Ct. R. at 48). The State did not respond to Boles' motion for summary disposition. Finding an abuse of discretion through an error of law by the district court in failing to apply the intermediate sanction scheme under K.S.A. 2018 Supp. 22-3716(c)(1) as required by K.S.A. 2018 Supp. 21-6604(n)(2), we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

After an incident occurring on February 13, 2019, Boles was charged with one count of possession of methamphetamine, one count of interference with law enforcement, and one count of domestic battery. Following a plea agreement, Boles pleaded guilty to possession of methamphetamine and domestic battery and the charge of interference with law enforcement was dismissed. On May 17, 2019, the district court sentenced Boles to an 11-month underlying prison term, with a concurrent 6-month jail term, and ordered presumptive probation for 18 months with a drug treatment requirement under K.S.A. 2018 Supp. 21-6824.

In November 2020, the State alleged Boles violated several conditions of his probation and moved to revoke his probation. During the probation revocation hearing in March 2021, Boles stipulated to the violations and was ordered to serve a 60-day jail sanction. Upon his release on April 25, 2021, Boles' probation was to be reinstated for a period of one year.

In February 2022, Boles' intensive supervision officer (ISO) reported that he failed to complete the requirements for the conditions of probation. The district court ordered an extension of Boles' probation for 12 months under K.S.A. 2018 Supp. 21-6608, starting March 19, 2022. Boles waived his right to an attorney and a hearing before the district court on that violation.

About a month later, the State alleged that Boles again violated his probation and moved to revoke his probation. During the probation revocation hearing, Boles stipulated to all alleged probation violations except for the violation of condition 1—failure to obey the law—which, was a new felony charge in Neosha County. After hearing testimony from State witnesses and arguments from both parties, the district court found that Boles

did violate all conditions but did not make specific findings regarding Boles' alleged new crimes in another county.

During closing arguments of the probation revocation hearing, Bole's counsel posed the argument that the district court could not revoke Boles' probation because an intermediate sanction was never imposed under K.S.A. 2018 Supp. 22-3716(c)(1)(C) and no exceptions under the statute were established to bypass intermediate sanctions. The court acknowledged that a 2- or 3-day jail sanction was not imposed but asked both parties whether the earlier 60-day sanction satisfied the intermediate sanction requirement under K.S.A. 2018 Supp. 22-3716(c)(1)(C). The court continued the hearing for 48 hours, asking both parties to provide the court with caselaw regarding the limited issue.

On July 1, 2022, during the continued hearing, the State presented to the district court that under Senate Bill 123, and under the revocation provision of K.S.A. 21-4603d(n), a defendant who fails to comply with the drug treatment plan shall be subject to revocation of probation and shall serve the underlying prison sentence as established by K.S.A. 21-4705. Because Boles was discharged from drug court twice for failing to comply, along with other violations, the State argued the violations were sufficient under the law to revoke probation.

Boles' counsel questioned whether he was ever actually discharged from the Senate Bill 123 program—the 18-month mandatory drug treatment he was ordered to complete in May 2019—because it should have expired in November 2020. Boles' counsel also agreed the State was correct to cite that under the Senate Bill 123, a defendant discharged from the program would have been subject to revocation. But he also argued that the State was incorrect because it relied on an outdated statute and the correct statute was K.S.A. 2018 Supp. 21-6604(n)(2), which provides that the intermediate sanctions scheme under K.S.A. 2018 Supp. 22-3176(c)(1) now applies.

After hearing both parties' arguments on the issue, the district court found it had revoked Boles' probation at the earlier hearing, and pursuant to K.S.A. 2018 Supp. 21-6604(n)(1) and (2), Boles must serve his underlying prison sentence as set out in K.S.A. 2018 Supp. 21-6805 due to his refusal to comply with the mandatory drug treatment program.

Boles timely appealed. Boles' attorney moved for summary disposition of appeal under Supreme Court Rule 7.041A. This court granted the motion to decide the case without briefing.

ANALYSIS

On appeal, Boles does not contest the findings of his violations by the district court during the probation violation hearing. He makes no arguments as to how or why the district court erred other than to cite authority that the decision to revoke probation rests within the sound discretion of the district court. He solely contends that the district court abused its discretion by revoking his probation.

A district court's decision to revoke probation usually involves two steps: (1) A factual determination that the probationer has violated a condition of probation; and (2) a discretionary determination as to the appropriate disposition in light of the proven violations. *State v. Skolaut*, 286 Kan. 219, 227, 182 P.3d 1231 (2008). Once a probation violation is established, a district court has discretion to revoke probation unless it is required by statute to impose an intermediate sanction. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). See K.S.A. 2022 Supp. 22-3716(b) and (c) (requiring graduated sanctions before revocation in certain circumstances). Judicial discretion is abused when its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d

931 (2018). Boles bears the burden of showing an abuse of discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

The district court made the factual determination that Boles violated the conditions of his probation. Specifically, the district judge stated:

"First of all, there is no doubt in my mind from the testimony of the witnesses, [Boles' ISOs], that both testified that Mr. Boles had intentionally failed to participate in the requirements of the treatment program. Specifically, [the first ISO] testified that Mr. Boles failed to attend group sessions; that he failed to report; that he failed to use the call-to-test proceedings; that he, as has been noted, twice he failed to complete drug court. He was discharged from drug court twice. [The first ISO] also testified that he refused to even meet with her for purposes of setting up inpatient treatment. And then [the second ISO], during her testimony, also confirmed the verification that he—Mr. Boles had failed to complete drug court.

....

" . . . In this instance, [the district court], on Tuesday of this week, based upon the stipulation, found that Mr. Boles had, in fact, violated the terms and he had, in fact, been revoked.

"Even were it not for the stipulation of Mr. Boles, based upon the testimony of [Boles' ISOs], I would have so found that he, in fact, did violate the terms of his community corrections and therefore is to be revoked."

Next, in light of the violations proven, the district court must make a discretionary determination as to the appropriate sentencing disposition. Though discretionary, the sentencing disposition in a probation revocation is not without legal parameters. Here, Boles' 18-month probation imposed in May 2019 for his February 2019 crime was governed by the mandatory drug treatment provision of K.S.A. 2018 Supp. 21-6824 (commonly referenced as Senate Bill 123).

As mentioned above, Boles was discharged from the drug abuse treatment program because the district court found he had "a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding," under K.S.A. 2018 Supp. 21-6824(f)(1)(B). So, under K.S.A. 2018 Supp. 21-6824(f)(2), an offender discharged from the drug abuse treatment program "shall be subject to the revocation provisions of K.S.A. 2018 Supp. 21-6604(n), and amendments thereto."

K.S.A. 2018 Supp. 21-6604(n)(2) states:

"If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the defendant's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to sanction or revocation *pursuant to the provisions of K.S.A. 22-3716*, and amendments thereto. If the defendant's probation is revoked, the defendant shall serve the underlying prison sentence as established in K.S.A. 2018 Supp. 21-6805, and amendments thereto." (Emphasis added.)

The district court started down the right path by clarifying that K.S.A. 2018 Supp. 21-6824 governs because "this was a mandatory-drug-treatment case." The court also correctly stated that K.S.A. 2018 Supp. 21-6604(n) is the appropriate statute to use in determining sanction or revocation of Boles' probation and read K.S.A. 2018 Supp. 21-6604(n)(2) into the record. But the district court then took a detour from the statutory language.

In its ruling, the district court cherry-picked pertinent language from the statute as grounds to revoke Boles' probation and jumped from "shall be subject to sanction or revocation" to the last sentence of the provision "[i]f the defendant's probation is revoked . . . the defendant shall serve the underlying prison sentence as established in K.S.A. 2021 Supplement 21-6805 and amendments to." But the district court ignored the critical

portion of the statute, "the defendant shall be subject to sanction or revocation pursuant to the provisions of K.S.A. 22-3716," which limits the legal parameters dictating the district courts sentencing disposition. Thus, the district court incorrectly interpreted K.S.A. 2018 Supp. 21-6604(n)(2) and discounted the required intermediate sanction scheme under K.S.A. 2018 Supp. 22-3716 in determining Boles' probation revocation. See *State v. Clapp*, 308 Kan. 976, 982, 425 P.3d 605 (2018) (Holding that sanctions and exceptions in effect in 2014 when the Legislature added the retroactive language apply to any offender who committed a probation violation after July 1, 2013.); K.S.A. 2018 Supp. 22-3716(c)(12).

To some extent, the district court's confusion is understandable. Frequently, courts use the phrase "revoked and reinstated"—for example in this case at the March 2021 probation violation hearing, the court used the language: "Upon completion of the jail sanction the court then *revokes and reinstates* the defendant's probation for a period of one year." (Emphasis added.) In such usage, the word "revoked" is misused to mean when any probation violation is determined to have occurred, or when an offender is required to serve a jail sentence as a sanction for violation but is then returned to his or her probationary status. But, as utilized in K.S.A. 2018 Supp. 21-6604(n)(2), "revoked" means when an offender is officially stripped of his or her probationary status and required to serve an underlying sentence. So, effectively, K.S.A. 2018 Supp. 21-6604(n)(2) requires the use of the sanction structure under K.S.A. 2018 Supp. 22-3716(c)(1), but when that structure is exhausted or not otherwise applicable due to an exception, then an offender's probationary status is formally revoked and he or she shall serve the underlying prison sentence.

Because Boles' circumstance was subject to the intermediate sanction scheme under K.S.A. 2018 Supp. 22-3716(c)(1), the district court needed to impose a nonprison, intermediate sanction before revoking his probation. Therefore, the district court abused its discretion by making an error of law when it relied solely on K.S.A. 2018 Supp. 21-

6604(n)(2) to revoke Boles' probation. The case is reversed and remanded to the district court for reconsideration of the probation revocation.

Reversed and remanded for further proceedings.