

NOT DESIGNATED FOR PUBLICATION

No. 125,603

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

AMBER N. SMITH-BARNEY,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN M. SMITH, judge. Opinion filed August 4, 2023.
Affirmed.

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

Before ARNOLD-BURGER, C.J., MALONE and SCHROEDER, JJ.

PER CURIAM: Amber Smith-Barney (Smith) appeals the revocation of her probation and imposition of a modified 100-month prison sentence. We granted Smith's motion for summary disposition of her sentencing appeal under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State does not object to the summary disposition and urges this court to affirm the district court's ruling. After reviewing the record, we find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2015, Smith physically attacked another woman and stole the woman's phone and tablet. As a result, she subsequently pleaded guilty to one count of aggravated

battery. The district court granted her motion for a dispositional departure from presumptive prison to probation. The court sentenced Smith in June 2016 to 144 months in prison but suspended the prison sentence for 36 months of probation, or until June 2019. As part of the sentence, the court also ordered Smith to pay \$350 in restitution to the victim.

Two years later, the district court held a probation violation hearing based on the State's allegations that Smith had committed a variety of probation violations, including new arrests for burglary and theft in August 2018. For these violations, the court extended Smith's probation for 36 months beginning in October 2018 and ordered her to serve a 60-day jail sanction.

In July 2019, another warrant was issued claiming Smith had violated her probation. It was alleged that she tried to alter her urine sample and continued to use alcohol and drugs. She ultimately agreed she had violated her probation, and the court ordered another 60-day jail sanction and entry into the community corrections residential program.

In August 2020, another warrant was issued for Smith for violation of probation. This time the allegation was that she tested positive for methamphetamine and violated the law by driving without a license. While that was still pending, in November 2020 another warrant was issued claiming that Smith had committed a new crime of domestic battery. Another warrant was filed in December 2020 alleging Smith committed several additional crimes including theft, criminal damage to property, and assault. A hearing was finally held in April 2021 on the allegations in the August 2020 warrant. The court extended her probation for another 24 months, or until April 2023, and ordered her to prison for 120 days and jail for 18 days. She was also ordered to complete a residential treatment program. We also note, as did the judge on the April 2021 journal entry, that five times between 2017 and 2019 Smith had been subjected to a two- or three-day jail

sanction imposed by her intensive supervising officer, in addition to the sanctions imposed by the court.

Another warrant was filed in September 2021 alleging Smith had violated her probation by failing to report to her probation officer and committing a new crime of simple battery/domestic violence. The battery charge was subsequently dismissed, and the State ultimately withdrew that one alleged violation. While out on bond awaiting hearing on the probation revocation, the court ordered her bond revoked for failing to comply with the conditions of pretrial release by continuing to use drugs and failing to submit to urine screens. She was released again on bond in October 2021, only to have it again forfeited for continuing to use methamphetamine while out on bond.

Finally, in August 2022, Smith stood before the court for the last time. She admitted that she failed to submit numerous urine tests and tested positive for methamphetamine several times. In light of her stipulation, the district court judge revoked her probation but modified her prison sentence from 144 months to 100 months. Smith had been on probation for six years and had been given numerous opportunities. The judge noted the danger that she was placing herself and her unborn child in—she was eight months pregnant at the time of the hearing—by her continued use of methamphetamine, even while in treatment. The district court also stated that it had the authority to impose a prison sentence in consideration of the public welfare and the welfare of Smith based on Smith's continued drug use despite treatment efforts. The judge found that her "continued use of Methamphetamine poses ongoing threat to the defendant, the public, and unborn child."

Smith timely appeals.

ANALYSIS

When a probation violation is present, an appellate court reviews the district court's revocation for abuse of discretion. *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020). An action constitutes as an abuse of discretion if (1) it is unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018). The party asserting abuse of discretion by the district court bears the burden of showing an abuse of discretion is present. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

To determine if the district court's action constituted a legal error, we must first determine what version of K.S.A. 22-3716 applies to Smith's case. Because Smith's crime of conviction was in June 2015, K.S.A. 2014 Supp. 22-3716 governs the legal basis upon which the district court may revoke Smith's probation. See *Coleman*, 311 Kan. at 334-37 (changes to the sanction scheme that became effective after July 1, 2014, do not retroactively apply to probationers who *committed their crimes of conviction* before the date each amendment became effective).

So before the district court could revoke Smith's probation and require her to serve her underlying prison term, the judge was required to adhere to a statutorily mandated set of graduated sanctions. In this case, the district court acted in accordance with the statute. Smith received all required intermediate sanctions under the statute. She was given a two- or three-day jail sanction on five different occasions. She was given two 60-day jail sanctions and one 120-day prison sanction all before the court finally revoked her probation and ordered her to serve her remaining prison sentence. Thus, the district court had statutory authority to revoke probation and impose an underlying term of imprisonment upon finding that she violated the terms of the probation. See K.S.A. 2014 Supp. 22-3716(c)(9) and (c)(1)(E).

In addition, the district court judge made specific findings that the public welfare and Smith's welfare would be jeopardized if she were returned to probation. This constitutes an independent basis to impose a defendant's underlying sentence without first imposing intermediate sanctions. K.S.A. 2014 Supp. 22-3716(c)(4). The judge noted that he did not find Smith to be credible when she claimed she did not know she was pregnant when she used methamphetamine, so she was clearly placing her unborn child at risk. She continued to use even after treatment, which indicated an inability to comply with probation. He noted that she was not only putting herself at risk, but she was also putting her child at risk. And finally, she was putting the community at risk by the potential of getting high and injuring someone.

Because Smith stipulated that she violated her probation and waived a formal hearing on the allegations that supported revocation, the district court did not commit any factual errors.

Instead, Smith's argument hinges on the overall assertion that the district court was unreasonable. However, Smith has failed to meet her burden of proof. At the probation violation hearing, Smith argued that the probation violations related to drug use and that imprisoning her would not serve a rehabilitative purpose but would be a financial burden. The district court found that continuing Smith's probation would result in the safety of the public being jeopardized, and that Smith's welfare would not be served by the continued probation. Smith acknowledged her repeated failure to report. Smith also testified that she missed several required drug testing appointments and submitted positive urine samples alongside denying any drug use while pregnant. In response to the arguments for and against Smith, the court reduced Smith's sentence from 144 months to 100 months. Based on Smith's repeated violations, a reasonable person would agree with the district court that Smith would not succeed on probation. And a reasonable person would agree that her probation should be revoked and she should be remanded to the custody of the Kansas

Department of Corrections to serve out the balance of the prison time on her modified sentence.

Affirmed.