NOT DESIGNATED FOR PUBLICATION

No. 125,764

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TANNER L. ROUBIDEAUX-DAVIS,
Appellant.

MEMORANDUM OPINION

Appeal from McPherson District Court; JOHN B. KLENDA, judge. Opinion filed September 1, 2023. Reversed and remanded with directions.

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

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

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: Tanner L. Roubideaux-Davis appeals the district court's decision revoking his probation and ordering him to serve his prison sentence without first imposing a graduated sanction. Roubideaux-Davis stipulated to several probation violations, including that he used marijuana, methamphetamine, alcohol, and oxycodone with fentanyl, and failed to report twice. On appeal, Roubideaux-Davis argues that because the State failed to meet its burden to prove he committed a new crime, the district court should have imposed a graduated sanction rather than revoke his probation. Having reviewed the record, we find the State met its burden, yet we still reverse and remand with directions.

Factual and Procedural Background

In August 2021, Roubideaux-Davis pleaded no contest to one count of possession of methamphetamine. Before sentencing, Roubideaux-Davis moved for border box findings, requesting an optional non-prison sentence under K.S.A. 2021 Supp. 21-6804(q). The presentence investigation recommended mandatory Senate Bill 123 (SB 123) drug treatment. Based on the border box findings, the district court granted Roubideaux-Davis' request, sentenced him to imprisonment for 30 months, then suspended that sentence and placed him on probation for 18 months. The district court also ordered Roubideaux-Davis, as part of his probation, to follow the SB 123 assessment which recommended that he participate in intensive outpatient and individual outpatient treatment for his drug addiction.

In September 2022, a McPherson County intensive supervision officer moved to revoke Roubideaux-Davis' probation. The affidavit in support of the amended motion alleged that Roubideaux-Davis had been unsuccessfully discharged from inpatient treatment; had used marijuana, methamphetamine, alcohol, and oxycodone with fentanyl; had failed twice to report as instructed; and committed traffic violations and had been arrested for his illegal act of driving under the influence.

At the probation revocation hearing, Roubideaux-Davis stipulated to the probation violations alleged in the amended motion and set out in the affidavit, except for its allegations that he was arrested and had engaged in illegal activity by driving under the influence and committing traffic violations. Roubideaux-Davis asked the district court to continue his probation and impose either a 3-day jail sanction or a 60-day jail sanction that he could serve on weekends.

Instead, the district court revoked Roubideaux-Davis' probation, explaining:

"Well, Mr. Roubideaux-Davis, I am going to revoke your probation for a number of reasons. Looking back on your file I saw you had 14 prior convictions. You have a very serious conviction back in Rice County. The sentence ran consecutive with that Rice County sentence. The Court did make border box findings in an attempt to allow you to be placed on probation, and it appears to the Court that you just have not been able to follow the terms and conditions of your probation order. Most concerning was the fact that you were not able to complete the inpatient treatment program and you were unsuccessfully discharged from that.

"In addition, by failing to report as instructed, by continuing to use methamphetamine, it's clear to the Court that we're just unable to provide to you the necessary supervision and programs to assist you without your cooperation, and it does not appear to the Court that you're going to be amenable to completing your probation. So the Court is going to revoke your probation."

The district court ordered Roubideaux-Davis to serve his original prison sentence of 30 months.

The journal entry of the probation violation hearing describes the violations which led to the court's revocation of probation as:

"On 5/19/2022, the defendant admitted to use of marijuana on 5/16/2022. On 5/26/2022, the defendant failed to report as instructed. On 6/2/2022, the defendant admitted to use of methamphetamines. On 6/2/2022, the defendant engaged in illegal activity for Driving in Violation of Restrictions on driver's license or permit as alleged by McPherson Police Department Citation number 28106. On 7/7/2022, the defendant failed to report as instructed. On 7/8/2022, the defendant engaged in illegal activity and was arrested for Driving Under the Influence (4th or subsequent), Driving Under the Influence (4th or Subsequent) Incapable of Safe Driving, Ignition Interlock Device; Operate Car without required Device, Vehicle Liability Insurance; Liability Insurance required as alleged by Hutchinson Police Department case number 22CR453. On 7/14/2022, the defendant admitted to use of alcohol, and oxycodone with fentanyl."

Roubideaux-Davis appeals, arguing that the district court erroneously revoked his probation without imposing a graduated sanction, as this was his first probation violation and none of the exceptions to the graduated sanction requirement applied. Roubideaux-Davis does not argue that the district court otherwise abused its discretion to revoke his probation.

General Legal Principles

Probation is an act of judicial leniency that a defendant receives as a privilege rather than a right. *State v. Gary*, 282 Kan. 232, 237, 144 P.3d 634 (2006). But once it is conferred upon a defendant, the defendant has a liberty interest in remaining on probation and may have it revoked only if the defendant violates the conditions of probation. *State v. Hurley*, 303 Kan. 575, 581, 363 P.3d 1095 (2016).

Once a probation violation is established, a district court has discretion to revoke probation unless the court is otherwise limited by statute. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022); see K.S.A. 2020 Supp. 22-3716 (requiring graduated sanctions before revocation at times). A judicial action constitutes an abuse of discretion if: (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Roubideaux-Davis bears the burden of showing an abuse of discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Generally, the statute in effect when the offender committed the crime of conviction governs the appropriate disposition for probation violations. *State v. Coleman*, 311 Kan. 332, 334-37, 460 P.3d 828 (2020). Because Roubideaux-Davis committed his original crime in April 2021, the 2020 version of K.S.A. 22-3716(c)(7) applies. Under those amendments, the district court may revoke an offender's probation after the

offender has received at least one two-or three-day jail sanction. See K.S.A. 2020 Supp. 22-3716(c)(1)(C).

But that general rule requiring graduated sanctions has four exceptions. A district court may revoke probation without having previously imposed a sanction if:

(A) The district court "finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction,"

(B) the offender received probation as the result of a dispositional departure,

(C) the offender committed a new felony or misdemeanor, or

(D) the offender absconded while on probation. K.S.A. 2020 Supp. 22-3716(c)(7).

The district court had never imposed a graduated sanction on Roubideaux-Davis, so the district court could not bypass the graduated sanction requirement unless one of these four exceptions applied. Yet the probation revocation hearing transcript and its journal entry do not identify a statutory bypass provision the district court relied on. But subsections (A), (B), and (D) of K.S.A. 2020 Supp. 22-3716(c)(7) are inapplicable, as the State does not argue that Roubideaux-Davis absconded from supervision or had received dispositional departure, see K.S.A. 2020 Supp. 21-6804(q) (border box sentence is not departure), or that the district court sufficiently found that Roubideaux-Davis jeopardized the public's safety or that his welfare would not be served by a graduated sanction. The parties agree that the sole issue is whether enough evidence showed Roubideaux-Davis had committed a new felony or misdemeanor under subsection (C) of that statute.

The State bears the burden to establish that the probationer violated the terms of probation by a preponderance of the evidence—meaning that the violation is more probably true than not true. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). Appellate courts review the district court's factual findings for substantial

competent evidence. See *State v. Inkelaar*, 38 Kan. App. 2d 312, 315, 164 P.3d 844 (2007). Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014). In determining whether substantial competent evidence supports the district court's findings, we must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the district court's findings and must disregard any conflicting evidence or other inferences that might be drawn from it. 298 Kan. at 1175-76 (citing *Unruh v. Purina Mills*, 289 Kan. 1185, 1196, 221 P.3d 1130 [2009]).

Roubideaux-Davis stipulated to the alleged probation violations set out in the motion to revoke except for its assertion that he committed illegal acts by his DUI and other traffic offenses. The parties agree that new charges against Roubideaux-Davis for DUI and other traffic offenses could not show he committed a new crime. We agree as well—panels of this court have consistently held that evidence of new criminal charges is not by itself enough to show by a preponderance of the evidence that a probationer committed a new crime. See *Lloyd*, 52 Kan. App. 2d at 783-84 (preponderance of evidence is higher standard than probable cause required to be bound over for trial); *State v. Roop*, No. 124,208, 2022 WL 4282154, at *3 (Kan. App. 2022) (unpublished opinion). And no other evidence of those offenses was admitted. So although K.S.A. 2020 Supp. 22-3716(c)(7)(C) allows a district court to bypass graduated sanctions if the defendant commits a new crime while on probation, new charges do not alone show by a preponderance of the evidence the commission of a new crime.

But the State does not rely on those new charges. Rather, it argues that Roubideaux-Davis' admission to "use of methamphetamines," coupled with his admission to a failed drug test established by a preponderance of the evidence his commission of the crime of possession of methamphetamine. See K.S.A. 2020 Supp. 21-5706(a)

(criminalizing possession of that drug). Roubideaux-Davis did not dispute those admissions at the revocation hearing and does not dispute them now.

We are aware of the distinction that probation officers, lawyers, and judges have made between technical and substantive probation violations—an "act that violates probation conditions but isn't otherwise unlawful is a technical violation, while an act that violates probation conditions [and] is otherwise unlawful is a substantive violation." *State v. Brown*, 51 Kan. App. 2d 876, 880, 357 P.3d 296 (2015). Thus *Brown* stated that a defendant's admission to "using" methamphetamine is a technical violation because Kansas law criminalizes methamphetamine possession, not its use. 51 Kan. App. 2d at 881.

But the distinction between technical and substantive violations is displaced by K.S.A. 2020 Supp. 22-3716(c)(7)(C), which provides that the district court may skip a graduated sanction when the probationer commits a new felony or misdemeanor. A new crime violation is thus serious enough, standing alone, to give the court discretion to revoke probation and impose the original prison sentence. So rather than label Roubideaux-Davis' admitted use of methamphetamine as a technical violation that has no tendency to show the new crime of possession, we ask whether all the facts of record show that Roubideaux-Davis committed that new crime.

The facts show defendant's culpable mens rea.

"Possession" in this context is defined as "having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control." K.S.A. 2020 Supp. 21-5701(q); see *Crosby*, 312 Kan. at 637. In *State v. Flinchpaugh*, 232 Kan. 831, 835-36, 659 P.2d 208 (1983), our Supreme Court held that the discovery of a drug in a person's blood is circumstantial evidence tending to prove possession of the drug, but it

is not enough by itself to establish guilt beyond a reasonable doubt. *Flinchpaugh* reasoned that "[t]he absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily, or introduced by artifice, into the defendant's system. The prosecution did not establish that defendant ever knowingly had control of the cocaine." 232 Kan. at 835.

But as the State contends, *Flinchpaugh* does not control here. We have more to show the defendant's mens rea here than drugs in a defendant's blood, and the State, at a revocation hearing, need not meet the "beyond a reasonable doubt" standard of proof that it bears at trial. See 232 Kan. at 836.

A culpable mental state is an essential element of every criminal offense. A culpable mental state may be established by proof that the accused acted "'intentionally,'" "'knowingly,'" or "'recklessly.'" K.S.A. 2022 Supp. 21-5202(a). A person acts knowingly with respect to the nature of or the circumstances of such person's conduct "when such person is aware of the nature of such person's conduct or that the circumstances exist." K.S.A. 2022 Supp. 21-5202(i). A person also acts knowingly with respect to a result "when such person is aware that such person's conduct is reasonably certain to cause the result." K.S.A. 2022 Supp. 21-5202(i). Roubideaux-Davis' stipulation does not state what his mental state was when he was using methamphetamine.

Still, the facts suggest culpable use of that drug. Roubideaux-Davis was originally convicted of possession of methamphetamine, was ordered to mandatory SB 123 drug treatment, and was unsuccessfully discharged from an inpatient drug treatment program; he then admitted in May 2022 his use of marijuana, admitted in June 2022 his use of methamphetamine, and admitted in July 2022 his use of alcohol and oxycodone with fentanyl. He then admitted to the court his use of methamphetamine and having a positive UA. The court thus found that Roubideaux-Davis was "continuing to use methamphetamine." These facts cut deeply against any speculation that the

methamphetamine that Roubideaux-Davis admitted using might have been injected involuntarily, or introduced by artifice, into his system, or that he did not know it was methamphetamine. See *State v. Brazzle*, 55 Kan. App. 2d 276, 286-87, 411 P.3d 1250 (2018) (finding circumstantial evidence suggested that Brazzle's possession of the oxycodone was illegal, and rejecting Brazzle's argument that the State had the duty to rebut every exception to illegal possession); *State v. Rizal*, 310 Kan. 199, 208-09, 445 P.3d 734 (2019) (mistake of fact, such as mistakenly believing item is a lawful substance, is an appropriate *defense* to charge of possession of marijuana). Substantial competent evidence thus shows that the State met its burden to show Roubideaux-Davis had a culpable mens rea when using methamphetamine—Roubideaux-Davis voluntarily and knowingly ingested methamphetamine.

Defendant's admitted use of methamphetamine and of his failure of a drug test show possession of that drug for revocation purposes.

The State next argues that culpable use of a controlled substance constitutes possession of the substance when showing a "new felony or misdemeanor" under our probation revocation statute, K.S.A. 2020 Supp. 22-3716(c)(7). As discussed above, the undisputed facts, viewed in the light most favorable to the State, show by a preponderance of the evidence that Roubideaux-Davis voluntarily and knowingly ingested methamphetamine. The State asserts that it necessarily follows that the defendant also possessed the substance and thus committed the new crime of possession of methamphetamine for purposes of revoking his probation.

The parties cite no Kansas case on point and we have found none. Thus, in reaching a decision, we are persuaded by the logic of other cases from other jurisdictions that have addressed the comparable issue in the context of revocation—federal circuits. Like Kansas law, federal law criminalizes the act of simple knowing possession of a

controlled substance 21 U.S.C. § 844 (2018), yet no federal statute criminalizes "use" or "consumption" of a controlled substance.

Federal circuits generally hold that "use" of a controlled substance constitutes "possession" of the substance for purposes of 18 U.S.C. § 3583(g) (2018)—the federal statute governing termination of supervised release after imprisonment. *United States v. Courtney*, 979 F.2d 45, 48 (5th Cir. 1992) (recognizing that "other federal circuits have uniformly found use to necessarily require possession" under 18 U.S.C. § 3583[g]).

> "The First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have also held that 'use' of controlled substances constitutes 'possession' for purposes of 18 U.S.C. § 3583. See *United States v. McAfee,* 998 F.2d 835 (10th Cir.1993); *United States v. Dow,* 990 F.2d 22 (1st Cir.1993); *United States v. Rockwell,* 984 F.2d 1112 (10th Cir.), *cert. denied,* 508 U.S. 966, 113 S. Ct. 2945, 124 L. Ed. 2d 693 (1993); *United States v. Courtney,* 979 F.2d 45 (5th Cir.1992); *United States v. Baclaan,* 948 F.2d 628 (9th Cir.1991); *United States v. Blackston,* 940 F.2d 877 (3d Cir.), *cert. denied,* 502 U.S. 992, 112 S.Ct. 611, 116 L.Ed.2d 634 (1991); *United States v. Oliver,* 931 F.2d 463 (8th Cir.1991); and *United States v. Dillard,* 910 F.2d 461 (7th Cir.1990).
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> "The First Circuit in *Dow,* 990 F.2d 22, the Ninth Circuit in *Baclaan,* 948 F.2d 628, the Third Circuit in *Blackston,* 940 F.2d 877, and the Eighth Circuit in *Oliver,* 931 F.2d 463, specifically held that a defendant's positive laboratory tests for narcotics constitutes 'possession' under 18 U.S.C. § 3583." *United States v. Hancox*, 49 F.3d 223, 224 (6th Cir. 1995).

The federal statute requires revocation for possession of a controlled substance, see 18 U.S.C. § 3583(g)(1), while our Kansas statute makes revocation for that crime discretionary. The only exception to mandatory revocation under federal law is if a suitable treatment option, or defendant's record of involvement in treatment, warrants relief. See 18 U.S.C. § 3583(d); *United States v. Crace*, 207 F.3d 833, 835 (6th Cir. 2000) (holding district court "required by 18 U.S.C. § 3583(g) to revoke the defendant's term of supervised release upon the defendant's positive drug test and admission of the use of a

controlled substance unless defendant could come under the exception in 18 U.S.C. § 3583(d)"). So for example, in *Hancox*, when the evidence revealed only that a defendant "used" controlled substances during supervised release, termination of supervised release was required because the defendant possessed the drugs. 49 F.3d at 224; see, e.g., *United States v. Price*, No. 6:20-CR-50-REW-HAI, 2023 WL 2925161, at *5 (E.D. Ky.) (unpublished opinion) (holding court must revoke defendant's release because he possessed controlled substance), *report and recommendation adopted* No. 6:20-CR-50-REW, 2023 WL 2920275 (E.D. Ky. 2023).

The Tenth Circuit squarely held that drug use constitutes possession in *United States v. Rockwell*, 984 F.2d 1112 (10th Cir. 1993), *abrogated on other grounds by Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000). There, the district court found the defendant had knowingly and wrongfully used marijuana and cocaine. It sentenced Rockwell under 18 U.S.C. § 3583(g), concluding that knowing use of controlled substances "necessarily implies [their] possession." 984 F.2d at 1113. On appeal, Rockwell argued that use did not constitute possession. Yet the Tenth Circuit disagreed, finding that in the revocation context, use is synonymous with possession:

> "There can be no more intimate form of possession than use. We hold that a controlled substance in a person's body is in the possession of that person for purposes of 18 U.S.C. § 3583(g), assuming the required *mens rea.* 'Use' in this context is synonymous with possession. See *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir.1992) ('[U]nder the present statutory scheme for criminal offenses, use is subsumed within possession.'); *United States v. Smith*, 978 F.2d 181, 182 (5th Cir.1992) (admitted use of contraband substance can be evidence of possession for purposes of § 3583(g)); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir.1991) ('possession,' within the meaning of § 3583(g), was properly determined based on positive urine tests for methamphetamines) (citing *Blackston*, 940 F.2d at 891; *United States v. Oliver*, 931 F.2d 463, 464-65 (8th Cir.1991) (affirming revocation of supervised release on the basis of positive urinalysis for various controlled substances); *United States v. Ramos-Santiago*, 925 F.2d 15, 17 (1st Cir.)

(same), *cert. denied,* 502 U.S. 840, 112 S. Ct. 129, 116 L. Ed. 2d 96 (1991); *United States v. Kindred*, 918 F.2d 485, 487 [&] n. 3 (5th Cir.1990) (same; 'Knowing use of drugs is akin to possession.')); *Blackston*, 940 F.2d at 883 ('evidence of drug use is undoubtedly probative of possession'); *cf. United States v. Thompson*, 976 F.2d 1380, 1381 (11th Cir. 1992) (§ 3583(e) and (g) applied without comment after offender tested positive for cocaine use); *United States v. Graves*, 914 F.2d 159, 161 (8th Cir.1990) (dictum equating use and possession); *United States v. Granderson*, 969 F.2d 980, 981-82 (11th Cir. 1992) (equating use and possession in the probation revocation context); *United States v. Gordon*, 961 F.2d 426, 429 (3d Cir. 1992) (same)." 984 F.2d at 1114-15.

The Tenth Circuit agreed with the district judge that it was "'errant sophistry . . . that somebody . . . [could] knowingly and willfully use[ ] a controlled substance and simultaneously claim that that d[id] not necessarily imply possession.'" 984 F.2d at 1115. *Rockwell* thus affirmed the district court's application of 18 U.S.C. § 3583(g) to terminate Rockwell's supervised release for possession of a controlled substance, shown by a single failed drug test together with the defendant's admission to one instance of knowing and voluntary use. 984 F.2d at 1115 & 1117 n.4.

The Tenth Circuit has repeatedly reaffirmed *Rockwell.* In *United States v. McAfee*, the court found *Rockwell* "simply stands for the unremarkable observation that a person cannot use a drug without possessing it." 998 F.2d 835, 837 (10th Cir. 1993). And in *United States v. Hammonds*, 370 F.3d 1032 (10th Cir. 2004), the court found that the connection drawn in *Rockwell* between use and possession is "simply a matter of common sense":

"[*Rockwell*'s] holding is in accord with the prevailing view among circuits that have considered the issue. . . .

"We continue to believe that, assuming the requisite culpable state of mind, the connection drawn in *Rockwell* between use and possession is simply a matter of common sense. As the Seventh Circuit stated in a similar context, '[i]nferring possession of a drug from the consumption of that drug is just as sensible as inferring, from the statement "I

ate a hamburger for lunch," that the person possessed the hamburger before wolfing it down.' *United States v. Trotter,* 270 F.3d 1150, 1153 (7th Cir. 2001). . . .

. . . .

"As our holding in *Rockwell* indicates, we do not believe that a court, presented with undisputed evidence of drug use, as shown by a positive drug test, together with evidence that the defendant's use was knowing and voluntary, can logically conclude that the defendant has not possessed the drug. As we stated explicitly in *Rockwell,* in the context of revocation proceedings based on positive drug tests, knowing and voluntary use is 'synonymous with possession.' *Rockwell*, 984 F.2d at 1114." *Hammonds*, 370 F.3d at 1035-37.

Our research has revealed no contrary authority. We agree that the connection drawn in *Rockwell* between use and possession is simply a matter of common sense, and that it is errant sophistry that somebody could knowingly and voluntarily use a controlled substance and simultaneously claim that this did not necessarily imply possession.

Simply put, there is no use exception to possession:

"Possession requires the knowing exercise of dominion or control. Similarly, in a sentencing or revocation context, it is clear that 'use' requires knowing and voluntary ingestion. But once a court finds a substance has been voluntarily and knowingly ingested, then, at least in almost any imaginable circumstance, it necessarily follows that the defendant has possessed the substance. In short, there is no 'use' exception to possession: if one knowingly and voluntarily exercises dominion and control over a substance-as by putting it in one's mouth and swallowing it knowing what it is—one possesses it, and this conclusion is in no way altered by the fact that the same facts may constitute one's 'use' of the substance. By the same token, it would not, for sentencing or supervised release purposes, be either 'use' or 'possession' if one believed the ingested substance was some other (non-controlled) substance or ingesting it involuntarily or unknowingly." *Courtney*, 979 F.2d at 49.

As a result, once a district court credits laboratory analysis as establishing the presence of a controlled substance in the specimen and then finds culpable use of the substance, possession under 18 U.S.C. § 3583(g) "necessarily follows." *United States v. Clark*, 30 F.3d 23, 25-26 (4th Cir. 1994) (while both "use" and "possession" require a culpable mens rea, a culpable mens rea can be validly inferred from a positive drug screen without a corresponding admission of use and despite the defendant's denial of knowing use).

Based on the logic of these well-reasoned cases and viewing all the evidence in the light most favorable to the State, as we must, we find that because more likely than not Roubideaux-Davis knowingly and voluntarily had control of the methamphetamine before he chose to use it, he possessed it. He thus committed the new crime of possession of methamphetamine.

The district court never found that defendant committed a new crime.

The problem here is that neither the district court's findings in court nor on the journal entry state that it decided to bypass graduated sanctions for Roubideaux-Davis' commission of a new crime. The district court failed to check the box on the journal entry for a defendant's commission of a "new crime."

We recognize, however, that particularized findings are not required for this exception. Although a revocation under subsection (A) of K.S.A. 2020 Supp. 22-3716(c)(1)(C) requires the district court to "find[] and set[] forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction," no such particularity requirement applies to a court's finding of a probationer's new crime under subsection (C). *Tafolla* made this point when confirming that the dispositional departure exception (K.S.A. 2018 Supp. 22-3716[c][9][B]) does not require particularized findings.

> "When the law requires a court to make findings and state them with particularity, the findings must be distinct rather than general, giving exact descriptions of all details. Implicit findings by a court are insufficient when particularized findings are required by statute. *State v. Clapp*, 308 Kan. 976, 989-90, 425 P.3d 605 (2018)." 315 Kan. at 330.

On the other hand, when, as here, particularized findings are not required by statute, implicit findings are enough, unless a party asks for more definite findings. "If there is no objection, we presume the district court 'found all facts necessary to support its judgment.' *McIntyre v. State*, 305 Kan. 616, 618, 385 P.3d 930 (2016) (Rosen, J.)." *Tafolla*, 315 Kan. at 332.

Are the court's implicit findings enough here? We find guidance in *Tafolla*. There, although the district court did not expressly invoke the dispositional departure exception, the probation revocation transcript reflected that the court had relied on its earlier decision which granted Tafolla a dispositional departure sentence. No more was required. As a result, the Supreme Court found no error of law in the district court's bypass of graduated sanctions—the dispositional departure exception gave the court discretion to do so, and the court's implicit findings were enough.

Similarly, here, the relevant subsection states that a district court may revoke probation without having previously imposed a sanction if "the offender commits a new felony or misdemeanor while the offender is on probation." K.S.A. 2020 Supp. 22-3716(c)(7)(C). And, as we have found above, substantial competent evidence shows that Roubideaux-Davis did so. Here, as in *Tafolla*, because the relevant statute does not require the court to make findings and state them with particularity, the court's implicit findings can be enough.

But in *Tafolla*, the probation revocation transcript showed that the court relied on its earlier dispositional departure sentence. Here, we have nothing to show that the district court found even implicitly that Roubideaux-Davis had committed a new crime

and that it decided to bypass graduated sanctions on that basis. True, the district court's findings made during the revocation hearing include that Roubideaux-Davis was "not able to complete the inpatient treatment program," was "unsuccessfully discharged from that," and was "continuing to use methamphetamine." And the court's reasons for revocation include that "[o]n 6/2/2022, the defendant admitted to use of methamphetamines." But those are the kind of findings a court often recites because a defendant has admitted to those facts, without implying that the defendant has committed a new crime. Nothing here shows that the district court expressly found or tacitly implied that the defendant had committed a new crime. Similarly, the affidavit in support of the amended motion to revoke probation stated that Roubideaux-Davis had admitted to use of methamphetamine, yet it did not allege such use was illegal nor did it allege he had illegally possessed any drug.

Roubideaux-Davis admitted during the hearing to his use of methamphetamine, and the district court found that he had done so. Because a preponderance of the evidence, as discussed above, shows that Roubideaux-Davis had committed the crime of possession of methamphetamine, the district court had the legal authority to bypass graduated sanctions by finding, expressly or implicitly, that he had committed that new crime. But the district court did not exercise its authority to bypass sanctions by finding a new crime, or any other exception. And "harmless error cannot save the probation revocation. The district court judge must apply the proper legal standard." *State v. Wilson*, 314 Kan. 517, 525, 501 P.3d 885 (2022). "[W]hile '[a] reviewing court may think it understands how a district court should view these circumstances, . . . it cannot know for sure until the lower court does the analysis.' 312 Kan. at 201." 314 Kan. at 524-25. Under these circumstances, we believe it best to reverse and remand to the district court with instructions to either impose a proper graduated sanction or set forth its reasons for bypassing the graduated sanctions.

In his reply brief, Roubideaux-Davis alleges for the first time that the district court violated his due process by revoking his probation based on a violation not alleged in the warrant. But this new argument is untimely raised. See Supreme Court Rule 6.05 (2023 Kan. S. Ct. R. at 38); *State v. McCullough*, 293 Kan. 970, 984, 270 P.3d 1142 (2012) (An appellant may not raise new issues in a reply brief.). And our decision renders it moot. Thus, we will not consider this argument.

Reversed and remanded with directions.