

NOT DESIGNATED FOR PUBLICATION

Nos. 126,170
126,171

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRANDON LEE GROSS,
Appellant.

MEMORANDUM OPINION

Appeal from Barton District Court; CAREY L. HIPPI, judge. Opinion filed November 9, 2023.
Affirmed.

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

Before CLINE, P.J., WARNER and PICKERING, JJ.

PER CURIAM: Brandon Lee Gross appeals the district court's revocation of his probation after stipulating to violating the terms of his probation. We granted his motion for summary disposition under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). Finding no reversible error of law or abuse of discretion, we affirm.

As part of a global plea agreement, Gross pleaded no contest to drug distribution charges in case Nos. 20CR468 and 21CR100 in exchange for a dismissal of the remaining charges, dismissal of two other criminal cases, and a favorable sentencing recommendation from the State. Gross was subject to presumptive prison in both cases, and the district court imposed the parties' agreed-upon underlying sentences of 54

months' imprisonment in case 20CR468 and 104 months' imprisonment in case 21CR100, with the sentences to run consecutive to each other pursuant to K.S.A. 2020 Supp. 21-6606(d). Both sentences were standard for his convictions. The court, however, granted Gross' unopposed motion for dispositional departure and suspended these prison sentences, ordering him to serve 36 months' probation instead.

While Gross was on probation, the State convicted him of a new crime in a different case—case No. 22CR48. At the probation violation hearing, Gross stipulated to violating the terms of his probation, including testing positive for methamphetamine and THC and committing a new crime while on probation. His stipulation was part of a plea agreement in cases 20CR468, 21CR100, and 22CR48. In line with this plea agreement, the district court revoked Gross' probation and ordered him to serve the underlying prison sentences in cases 21CR100 and 22CR248. Gross did not object to the revocation of his probation or the imposition of his underlying sentences; he simply asked that he be awarded any appropriate credit for time served.

On appeal, Gross admits the district court had the authority to revoke his probation and impose his underlying sentences. See K.S.A. 2022 Supp. 22-3716(c)(1)(C) (allowing the district court to order any "violator to serve the sentence imposed, or any lesser sentence"); K.S.A. 2022 Supp. 22-3716(c)(7)(B) (allows district court to bypass graduated sanctions when probation was granted because of a dispositional departure); K.S.A. 2022 Supp. 22-3716(c)(7)(C) (allows district court to revoke probation when defendant commits new offense while on probation). He simply argues the court abused its discretion by ordering him to serve the underlying sentences instead of reinstating probation or imposing a lesser sentence. He offers no reason why the court should have reinstated probation, nor does he provide any legal authority for his assertion that the court should have imposed a lesser sentence.

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). Gross bears the burden of proving that the district court abused its discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

We do not find Gross has satisfied his burden. He merely asserts the combined underlying sentence was "unduly harsh" and the district court should have modified it. This argument seems to be a misguided attempt to avoid the jurisdictional bar Gross faces in challenging his underlying sentences. Gross' underlying sentences were imposed on August 12, 2021, which was more than a year before he filed this appeal on March 2, 2023. See *State v. Lucas*, No. 104,298, 2011 WL 781523 (Kan. App. 2011) (unpublished opinion) (finding appellate court lacks jurisdiction to consider challenge to length of underlying prison sentence raised in challenge to probation violation order and not in timely appeal of sentence). Further, he entered into two plea agreements in which the State agreed to recommend these underlying sentences be imposed—first in the original disposition of case 20CR468 and case 21CR100, and again when his probation violations in those cases were adjudicated along with his sentence in case 22CR48.

The district court did not abuse its discretion in revoking Gross' probation and ordering him to serve his underlying sentences.

Affirmed.