NOT DESIGNATED FOR PUBLICATION

Nos. 126,604
126,605

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee*,

v.

DALTON WEAVER,
*Appellant*.

MEMORANDUM OPINION

Appeal from Dickinson District Court; BENJAMIN J. SEXTON, judge. Opinion filed May 3, 2024. Affirmed.

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

Before ARNOLD-BURGER, C.J., HURST and COBLE, JJ.

ARNOLD-BURGER, C.J.: Dalton Weaver appeals the revocation of his probation and imposition of his underlying sentences in two cases. This court granted Weaver's motion for summary disposition of his appeal under Supreme Court Rule 7.041A (2024 Kan. S. Ct. R. at 48). After reviewing the records, we find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL HISTORY

In July 2015, Weaver entered a guilty plea in Dickinson County District Court to one count of possession of methamphetamine with intent to distribute for conduct that

occurred in June 2015 (Case 1). The district court sentenced Weaver to 111 months in prison, but the court found substantial and compelling reasons to grant Weaver's motion for a dispositional departure to probation for a term of 36 months. Because of two separate and subsequent probation violations, Weaver ended up serving a 2-day jail sanction and later a 180-day prison sanction on Case 1.

The State next charged Weaver with violating the Kansas Offender Registration Act (KORA) for conduct that occurred on July 10, 2015. Weaver pleaded guilty in May 2016 to an amended felony charge (Case 2).

The district court held a hearing where it addressed—a motion to revoke probation in Case 1 and sentencing for Case 2. The parties announced a plea agreement in the case where Weaver agreed to the violation of probation in Case 1 and pleaded guilty to Case 2. In return, the State agreed to recommend that his probation in Case 1 be reinstated and that he be granted a dispositional departure to probation on Case 2. And Weaver agreed that if he violated his probation again, he would not argue for reinstatement but would "serve his underlying sentence." The district court adhered to the announced plea agreement. In Case 1, the district court revoked and reinstated Weaver's probation for 24 months concurrent with his probation granted in Case 2. In Case 2, the district court imposed the standard prison term of 30 months but granted a dispositional departure to 24 months of probation. The court ordered that the underlying prison sentence in Case 2 would run consecutive to Case 1.

It did not take long for the State to again bring a probation violation motion before the court. On February 1, 2017, the district court held a probation violation hearing in the two cases. At the hearing, Weaver stipulated to violating his probation in both cases by failing to remain alcohol free, remain drug free, follow lawful orders of his intensive supervision officer, submit urinalysis testing, complete court ordered treatment, and report as directed. The district court determined that Weaver violated his probation in

both cases by committing those violations. At the hearing, defense counsel reiterated that as part of his plea agreement in Case 2, Weaver had agreed not to ask that his probation be reinstated if he violated it. Weaver asked the court to impose the 30-month prison sentence in Case 2—consistent with the plea agreement—but to reinstate his probation in Case 1, to be served after the prison sentence. Even so, the district court revoked Weaver's probation in both cases, imposing a modified sentence of 66 months (instead of 111 months) in prison in Case 1 and the original 30-month prison sentence in Case 2, consecutive to his prison sentence in Case 1.

This court consolidated Cases 1 and 2 on appeal and granted Weaver's motion for summary disposition of this sentencing appeal.

## ANALYSIS

On appeal, Weaver does not challenge the district court's finding that he violated the terms of his probation. Instead, Weaver argues, with no specifics, that the district court abused its discretion when ordering him to serve his underlying sentences rather than reinstating probation in both cases. 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 also K.S.A. 22-3716(b) and (c) (requiring graduated sanctions before revocation in some cases).

A district court's decision to revoke a defendant's probation and order the defendant to serve the underlying sentence must be exercised within the statutory framework of the applicable probation statute. A district court abuses its discretion when it makes an error of law. But if the district court's decision complied with the applicable statutes, we must affirm its decision unless the decision is arbitrary, fanciful, or unreasonable. See *State v. Bilbrey*, 317 Kan. 57, 63, 523 P.3d 1078 (2023) (A judicial

action constitutes an abuse of discretion if it is arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact.).

Because Weaver committed his crimes in June and July 2015 and committed his probation violations after July 1, 2013, the 2014 and 2015 versions of the probation violation statute control what the district court was statutorily authorized to do if it found that Weaver violated his probation. See *State v. Clapp*, 308 Kan. 976, 982, 425 P.3d 605 (2018); *State v. Coleman*, 311 Kan. 332, 334-37, 460 P.3d 828 (2020). Both versions of the probation violation statute allow a district court to revoke probation if it has already imposed a jail sanction and a prison sanction. K.S.A. 2014 Supp. 22-3716(c)(1)(B), (c)(1)(D), (c)(1)(E); K.S.A. 2015 Supp. 22-3716(c)(1)(B), (c)(1)(D), (c)(1)(E). The district court, therefore, did not abuse its discretion by revoking probation and imposing a modified prison sentence in Case 1.

For Case 2, however, no intermediate sanctions had been imposed. So, without the plea agreement or stipulation by Weaver, the judge would have had to "[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." K.S.A. 2015 Supp. 22-3716(c)(9). In the probation violation journal entry, the district court stated that it was ordering the original sentence based on public safety or offender welfare finding, although from the bench the judge simply ruled he was revoking Weaver's probation because he was not "amenable" to probation."

This is not the kind of particularized finding required to bypass intermediate sanctions. See *State v. McFeeters*, 52 Kan. App. 2d 45, 49, 362 P.3d 603 (2015) (holding that the court must explicitly explain how the safety of the members of the public will be jeopardized if the offender remains on probation or how the offender's welfare will not be served by imposition of an intermediate sanction). But as the transcript from the probation revocation hearing reflects, Weaver asked the district court to impose his

underlying prison sentence in Case 2—because that was what he had agreed to when he entered the plea and received a departure to probation.

Although there is no statutory factor for bypassing intermediate sanctions when the defendant agrees to it, we cannot say it was an error of law to do so. A litigant may not invite an error and then complain of it on appeal. *State v. Green*, 315 Kan. 178, 183, 505 P.3d 377 (2022).

Moreover, although the actual plea agreement is not contained in the record on appeal, no one disputed at the time—nor on appeal—that the plea agreement relayed by Weaver's attorney—as an officer of the court—was accurate. Our Supreme Court has applied contract law principles to the construction of plea agreements. *State v. Smith*, 244 Kan. 283, 285, 767 P.2d 1302 (1989) ("[W]hile principles of contract law cannot be blindly incorporated into the area of plea bargaining, they provide a useful analytical framework."). A plea agreement is based on an expectation that the terms will be honored by each party and that redress to enforce the agreement is available when necessary in the courts. *Santobello v. New York*, 404 U.S. 257, 260-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

Our court has made it clear that a defendant can bargain away certain rights—constitutional or statutory—as part of a plea agreement.

> "A plea agreement is akin to a contract. See *State v. Wills*, 244 Kan. 62, 68-69, 765 P.2d 1114 (1988). Both parties to such an agreement are bound by its terms, and our appellate courts have consistently forced the parties to abide by their agreement. See, *e.g.*, *State v. Ratley*, 253 Kan. 394, Syl. ¶ 5, 855 P.2d 943 (1993). The very nature of such an agreement is that the defendant waives statutory rights or constitutional rights in exchange for dismissal of other criminal charges or prosecutorial recommendations at sentencing. So long as the agreement is entered into voluntarily, knowingly, and intelligently, the terms of such an agreement are clearly enforceable as a matter of law.

See *State v. Shopteese*, 283 Kan. 331, 340-41, 153 P.3d 1208 (2007)." *State v. Perry*, 39 Kan. App. 2d 700, 702, 183 P.3d 12 (2008).

Again, there is no dispute that, at least as it relates to Case 2, Weaver agreed not to ask for reinstatement of probation should he violate it. This was in return for the State recommending probation in a presumptive prison case—a felony committed while he was on felony probation. There is also no dispute that Weaver violated his probation after he made that agreement. And Weaver does not argue that the plea agreement was not freely and voluntarily entered.

Based on Weaver's stipulation to violating his probation in both cases, our case law regarding invited error, and Weaver's undisputed plea agreement, we cannot say that no reasonable person would agree with the district court's decision not to reinstate probation. The district court, therefore, did not abuse its discretion by imposing Weaver's underlying sentence in Case 2.

Weaver also argues that the district court violated his rights by using his criminal history to increase his sentence without proving it to a jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Kansas courts have consistently rejected this argument, and we do so again here. See *State v. Albano*, 313 Kan. 638, Syl. ¶ 4, 487 P.3d 750 (2021); *State v. Ivory*, 273 Kan. 44, Syl., 41 P.3d 781 (2002).

Affirmed.

* * *

HURST, J., dissenting: I join with the majority in finding that the district court properly revoked Weaver's probation in Case 1 where he was convicted of possession of

methamphetamine with intent to distribute. However, I respectfully dissent to the majority's conclusion affirming the district court's revocation of Weaver's probation in Case 2 for his violation of the Kansas Offender Registration Act (KORA). As such, I would reverse the district court's revocation of Weaver's probation in Case 2 and remand for further proceedings.

As the majority notes, the statutory scheme in place at the time of Weaver's probation revocation hearing for Case 2 required the district court to impose intermediate sanctions or identify a statutorily permitted reason to bypass such intermediate sanctions before revocation. K.S.A. 2015 Supp. 22-3716(c)(1)(B), (c)(1)(D), (c)(1)(E), (c)(7), (c)(8), and (c)(9). Therefore, the district court is prohibited from revoking an offender's probation when it fails to first impose intermediate sanctions or identify a reason to bypass those sanctions.

Here, it is undisputed that in Case 2 the district court failed to impose intermediate sanctions and failed to identify any permissible reason allowing it to bypass intermediate sanctions. Normally, that would require reversal of the district court's revocation. See, e.g., *State v. Clapp*, 308 Kan. 976, Syl. ¶¶ 2-4, 425 P.3d 605 (2018) (reversing a probation revocation when the district court failed to impose intermediate sanctions or state a permissible reason for bypassing).

The majority relies on Weaver's 2016 KORA violation plea agreement as a contract between the State and Weaver which would permit the district court to revoke Weaver's probation without first imposing intermediate sanctions. But I find that argument unpersuasive under these circumstances. Here, the district court did not rely on the plea agreement when making its revocation decision. Therefore, it failed to make any particularized findings permitting it to bypass intermediate sanctions. That alone supports reversal. See, e.g., *Clapp*, 308 Kan. at 990-91 (reversing revocation when the district court failed to make particularized findings even if the district court intended to apply the

bypass statute). Moreover, Weaver's 2016 KORA violation plea agreement is not included in the record on appeal; its provisions allegedly permitting the court to revoke Weaver's probation without imposing intermediate sanctions were not stated on the record before the district court; and the statements of Weaver's attorney regarding the document are not evidence upon which this court can rely. I cannot rely on contract principles for upholding the district court's revocation when the contract is not in evidence, and the district court did not rely on those principles.

I would affirm the district court's revocation in Case 1 and reverse and remand in Case 2.