

NOT DESIGNATED FOR PUBLICATION

No. 121,132

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOHN JEREMIAH RUTHERFORD,
Appellant.

MEMORANDUM OPINION

Appeal from Lyon District Court; W. LEE FOWLER, judge. Opinion filed August 23, 2019.
Affirmed.

Submitted by the parties for summary disposition pursuant to K.S.A. 2018 Supp. 21-6820(g) and (h).

Before MALONE, P.J., LEBEN and POWELL, JJ.

PER CURIAM: John Jeremiah Rutherford appeals the district court's revocation of his probation and imposition of his prison sentence. We granted Rutherford's motion for summary disposition pursuant to Supreme Court Rule 7.041A (2019 Kan. S. Ct. R. 47). The State has filed no response. After a review of the record, we affirm.

Rutherford pled no contest to one count each of possession of methamphetamine and criminal possession of a firearm. In September 2018, the district court sentenced Rutherford to a controlling prison sentence of 42 months. However, the district court granted his motion for dispositional departure and placed him on probation for a term of

18 months. As one condition of probation, the district court ordered Rutherford to undergo a drug court evaluation.

The record on appeal reveals that because of Rutherford's failure to appear at two drug court sessions, he was ordered and served two separate sanctions of three days and seven days in jail. Then, in February 2019, the drug court issued a bench warrant for Rutherford's arrest due to his failure to appear. The State sought to revoke his probation. In the supporting affidavit, the State alleged Rutherford had violated the terms of his probation by submitting five urinalysis (UA) samples that tested positive for methamphetamine, failing to submit three UAs, failing to attend drug court sessions, and failing to attend his group sessions. The State also alleged Rutherford had violated the terms of his probation by committing new crimes based on his arrest and pending charges in a new case.

At the probation revocation hearing, Rutherford stipulated to violating his probation as the State had alleged. Because Rutherford's new charges included a severity level 3 drug charge for possession with intent to distribute methamphetamine, the district court revoked Rutherford's probation due to his commission of new crimes and imposed his underlying prison sentence.

On appeal, Rutherford argues the district court abused its discretion by revoking his probation and imposing his underlying prison term instead of imposing an intermediate sanction that would allow him to better address his drug addiction through treatment.

Once a probation violation has been established, the decision to revoke probation is within the discretion of the district court. *State v. Skolaut*, 286 Kan. 219, 227, 182 P.3d 1231 (2008). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) it is based on an error of law;

or (3) it is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). Rutherford bears the burden of showing an abuse of discretion. See *State v. Rojas-Marceleno*, 295 Kan. 525, 531, 285 P.3d 361 (2012).

The district court's discretion to revoke a defendant's probation is limited by the intermediate sanctions requirements outlined in K.S.A. 2018 Supp. 22-3716. Generally, a district court is required to impose intermediate sanctions before revoking an offender's probation. See K.S.A. 2018 Supp. 22-3716(c); *State v. Huckey*, 51 Kan. App. 2d 451, 454, 348 P.3d 997, *rev. denied* 302 Kan. 1015 (2015). However, there are exceptions that permit a district court to revoke probation without having previously imposed the statutorily required intermediate sanctions, one of which is when the offender commits a new crime while on probation. See K.S.A. 2018 Supp. 22-3716(c)(8)(A). Another exception permitting revocation without imposing sanctions is if the offender's probation was "originally granted as the result of a dispositional departure." K.S.A. 2018 Supp. 22-3716(c)(9)(B).

While Rutherford stipulated to violating the terms and conditions of his probation, it is unclear from the record whether he stipulated to committing new crimes as the State merely alleged that he had been arrested and charged with new crimes. But given that Rutherford was originally placed on probation as a result of a dispositional departure, the district court had the authority to revoke Rutherford's probation. While Rutherford concedes these points, he argues the district court abused its decision because he should have been given another chance to obtain drug treatment. In light of Rutherford's prior failures at probation, he fails to persuade us that no reasonable person would agree with the district court's decision. The district court did not abuse its discretion in revoking Rutherford's probation and imposing his underlying prison sentence.

Affirmed.