NOT DESIGNATED FOR PUBLICATION

No. 125,320

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSHUA DEAN WADE,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed May 5, 2023. Affirmed.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellant.

Michael R. Serra, deputy district attorney, *Michael F. Kagay*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before COBLE, P.J., HILL and ATCHESON, JJ.

PER CURIAM: Joshua Dean Wade pleaded guilty to one count of criminal threat, one count of aggravated battery, and one count of criminal possession of a weapon. The district court sentenced Wade to 33 months' imprisonment but granted him a 24-month term of probation. After Wade violated the terms of that probation by committing a new crime, the district court revoked his probation and imposed the original sentence. Wade now appeals, arguing that the district court was unreasonable and abused its discretion by revoking his probation without imposing intermediate sanctions or modifying his original sentence. On our review, the district court's decision was not unreasonable and was

within its discretion provided under K.S.A. 2021 Supp. 22-3716(c)(7)(C). We affirm the district court's revocation of Wade's probation.

FACTUAL AND PROCEDURAL BACKGROUND

Following incidents of domestic violence in February 2021, Wade pleaded guilty to one count of criminal threat, one count of aggravated battery, and one count of criminal possession of a weapon. During sentencing, the district court found Wade's criminal history score to be C, without objection from either party, and imposed a 33-month prison sentence, but it suspended that sentence and placed Wade on 24 months' probation. One condition of Wade's probation was that he could have no contact with the victim and visitation with children only through a neutral third party.

Three months after sentencing, the State filed a motion for an order to show cause why Wade's probation should not be revoked. The State presented as evidence the affidavit of Wade's probation officer, stating that Wade violated his probation terms because he failed to report for more than 30 days and failed to comply with the court-ordered Batterers Intervention Program. The probation officer outlined that Wade previously received a 72-hour sanction in the Shawnee County Department of Corrections, but despite that sanction, Wade did not comply with the probation officer's recommendations.

Two months later, Wade's probation officer filed an amended affidavit stating that, in addition to the two prior violations, Wade also failed to remain law abiding, as three new criminal cases had been filed against him. All three new cases encompassed prohibited and violent contact with the victim and children.

The district court held a probation revocation hearing. During the hearing, the victim testified that Wade violated the no-contact order three times since his sentencing.

One encounter occurred between Wade, the victim, and her oldest daughter, who were inside their car, in the parking lot of a hotel on July 8, 2021. On that date, Wade drove up to the victim's vehicle while yelling at her, and she called the police while driving to the police station; Wade did not follow.

The victim further testified that a few days later, while waiting in her vehicle with her oldest daughter for the police to check her house, Wade pulled up beside her in his vehicle, exited his vehicle, and approached hers. When she refused to roll down her window, Wade ripped off the door handle of her vehicle and then got back into his vehicle and rammed her vehicle with his truck. She also testified that at the end of that same month, during the last encounter with Wade, he entered her home uninvited. He took cellphones away from her and her daughters, repeatedly threatened her life, slapped her, held a knife to her throat, and stabbed her furniture with an ice pick. She testified that after three days of Wade being at her home, she eventually called the police from a Kwik Shop during another argument.

The State offered three police officers as witnesses to these three incidents. Wade presented no evidence during the hearing, but his counsel conceded to the violation of the no-contact order. Defense counsel argued, though, that the State failed to show by a preponderance of the evidence that Wade committed the other alleged offenses.

After receiving evidence and considering the arguments of both parties, the district court found by a preponderance of the evidence that Wade failed to remain law abiding by violating the protective order, thereby violating his probation terms. As a result, the district court revoked Wade's probation.

The State asked that Wade's original sentence be imposed without modification. Wade requested that the court impose a 60-day sanction with an extended probation period of 12 months beyond the original term or, in the alternative, to modify his original

sentence to 12 months' imprisonment. The district court imposed the original sentence of 33 months' imprisonment.

Wade timely appeals.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN REVOKING WADE'S PROBATION?

Wade argues that the district court abused its discretion by revoking his probation. Specifically, he contends that the district court abused its discretion by imposing his original prison sentence rather than implementing an intermediate sanction and extending his probation.

Standard of Review

An appellate court reviews the district court's revocation of an offender's probation for an abuse of discretion. *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020). A district court abuses its discretion if its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The movant bears the burden of showing an abuse of discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

The district court did not abuse its discretion by revoking Wade's probation.

We note that Wade does not argue that the district court's decision was either factually or legally erroneous. Rather, Wade suggests that the district court could have implemented other options besides revoking his probation. Wade did not adequately brief this issue on appeal, and we consider the argument waived or abandoned. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

Wade next argues that the district court abused its discretion by imposing the underlying prison sentence. Again, Wade fails to present any legal or factual argument on which this court could find the district court abused its discretion. Instead, Wade asserts that the district court's decision to impose the original 33-month sentence, without modification, was simply unreasonable. Wade maintains that revocation of his probation was not a reasonable choice because it was not "consistent with the legislative goal of the sanction[] scheme." He simply asserts that in order for the graduated sanction system to work as intended, the "district courts must make full use of their battery of intermediate sanctions."

Wade makes a policy argument suggesting that the district court's decision to revoke his probation contradicted the intent of the Legislature in enacting the graduated sanction scheme. Such an argument invites us to review the sanction scheme itself. Statutory interpretation presents a question of law over which this court has unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). This court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 309 Kan. at 164. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

The intermediate sanction statutory scheme of Kansas has undergone an extensive transformation over the last decade. Before July 1, 2013, district courts had broad discretion to impose a variety of sanctions once it determined a defendant violated the terms of probation. But effective July 1, 2013, the Legislature substantially amended K.S.A. 22-3716 and eliminated much of that discretion. See *State v. Clapp*, 308 Kan. 976, 981-82, 425 P.3d 605 (2018). Upon its enactment in 2013, the first sanction available to a district court after a probationer violated the terms of probation—other than modifying conditions of probation—was a two- or three-day jail sanction. See K.S.A. 2018 Supp. 22-3716(c)(1)(B). After at least one jail sanction was imposed and another probation violation occurred, the district court could impose a sanction of 120 or 180 days in prison. See K.S.A. 2018 Supp. 22-3716(c)(1)(C)-(D). And unless certain bypass exceptions applied, only after a district court imposed a 120- or 180-day prison sanction and a probationer committed another violation could the district court order the probationer to serve the underlying prison sentence. See K.S.A. 2018 Supp. 22-3716(c)(1)(E). But these 120- and 180-day sanctions are no more.

Effective July 1, 2019, the Legislature removed the 120-day and 180-day prison sanctions from the intermediate sanctioning scheme. See K.S.A. 2019 Supp. 22-3716(c). So, under the 2019 amendment, 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. 2019 Supp. 22-3716(c)(1)(C). But also included in the 2019 amendments were exceptions to the required graduated sanctions. Most applicable here, under K.S.A. 2021 Supp. 22-3716(c)(7), the district court may revoke an offender's probation without having previously imposed a sanction pursuant to K.S.A. 2021 Supp. 22-3716(c)(1) if the offender commits a new felony or misdemeanor while on probation, under K.S.A. 2021 Supp. 22-3716(c)(7)(C).

The statute's language regarding exceptions to the intermediate sanction scheme is clear and unambiguous. Wade may be correct that the intermediate sanctions scheme was

enacted by the Kansas Legislature to limit the prison population by decreasing the number of probation violators entering the prison system. Regardless, his theory that this should extend to his situation fails to acknowledge that the Legislature intentionally crafted exceptions to the intermediate sanctions scheme. To argue that applying the plain meaning of the exceptions provisions somehow conflicts with the Legislature's intent creates an absurd and illogical result. This court presumes the Legislature does not intend to enact meaningless legislation. *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020).

Here, the underlying facts of the case, and how they fit into the sanctions exceptions, is simple. While on probation, Wade was charged with new crimes in Shawnee County for violating his no-contact order. The district court revoked Wade's probation without imposing a graduated sanction based on his failure to remain law abiding. Contrary to Wade's argument, and considering the plain language of the statute, it was not unreasonable for the district court to revoke Wade's probation without previously imposing a sanction under the current statute because he committed a new crime. As such the district court did not an abuse its discretion and was not unreasonable.

Consequently, Wade's primary argument—his policy argument that the district court should have imposed sanctions or otherwise modified his sentence—fails. And, even if Wade had properly argued the district court otherwise abused its discretion by revoking his probation, the evidence in the record sufficiently shows that revocation was well within the district court's discretion.

Wade conceded during the probation revocation hearing that he violated the no-contact order and that was a crime. The district court could have revoked Wade's probation and imposed the original sentence solely based on that admission under K.S.A. 2021 Supp. 22-3716(c)(7)(C).

Yet after hearing the testimony and the arguments from both parties, the district court found that Wade was still a threat to his family. In doing so, the district court went beyond revocation solely regarding new crimes, but made findings that the safety of the public, especially his family members, would be jeopardized, articulating with particularity an additional ground for bypassing intermediate sanctions under K.S.A. 2021 Supp. 22-3716(c)(7)(A). Also, Wade previously served a three-day 'quick dip' sanction for failing to report to his probation officer and failure to comply with the court-ordered treatment. His previous sanction, which failed to deter his behavior while on probation, also defeats Wade's contentions that the district court somehow discounted the imposition of intermediate sanctions.

For all these reasons, the district court's decision to revoke Wade's probation under K.S.A. 2021 Supp. 22-3716(c)(7) was well within its sound discretion.

Affirmed.