NOT DESIGNATED FOR PUBLICATION

No. 125,763

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALBERT C. WHITAKER III,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; JARED B. JOHNSON, judge. Submitted without oral argument. Opinion filed December 29, 2023. Affirmed.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: The Saline County District Court revoked the probation of Albert C. Whitaker III because he repeatedly failed to initiate contact with his assigned probation officer after he avoided a presumptive prison term on a second conviction for violating the Kansas Offender Registration Act, K.S.A. 22-4901 et seq. On appeal, Whitaker contends the district court overstepped its judicial discretion by refusing to continue his probation so he could seek community-based substance abuse treatment. More than anything, this case illustrates the cascading adverse consequences that may befall criminal defendants who do not report as required by statute or court order. The district

court acted within its broad discretion in revoking Whitaker's probation and ordering him to serve the underlying prison sentence on the KORA conviction. We, therefore, affirm.

FACTUAL AND PROCEDURAL HISTORY

After being convicted of aggravated battery in 2008 and serving a prison sentence, Whitaker was required to register and report as a "violent offender" under KORA. See K.S.A. 2022 Supp. 22-4902(e)(2) (violent offender); K.S.A. 2022 Supp. 22-4905 (registration and reporting requirements). Whitaker failed to report in 2019 and was charged, convicted, and duly punished for that KORA violation. In June 2021, the State charged Whitaker with two counts of again failing to report as required under KORA—a severity level 5 person felony based, in part, on his past conviction. In a deal worked out with the State, Whitaker pleaded guilty to one count. The State dismissed the other count and joined in a recommendation to the district court that Whitaker receive a standard guidelines sentence of 57 months in prison with a dispositional departure to probation.

The district court imposed a 57-month sentence on Whitaker in September 2021 and placed him on probation for 36 months. At the sentencing hearing, Whitaker's lawyer informed the district court that Whitaker faced a sanction of incarceration from the Prisoner Review Board because he had violated the terms of his conditional release in an earlier case. See K.S.A. 75-5217. The district court advised Whitaker that he would be obligated to report to his assigned probation officer promptly after completing any prison sanction the Board might impose.

The Board did sanction Whitaker, and he was released from custody in March 2022. But he never reported to the Saline County probation office. In May, his assigned probation officer requested a warrant based on Whitaker's failure to report after his release on March 11. Whitaker was picked up for the probation violation, and the district court held a hearing in June. Whitaker did not dispute the violation. The district court

ordered him to serve a three-day jail sanction and extended his probation. The district court also directed Whitaker to report to his probation officer immediately after completing the jail sanction. Whitaker did not.

About a month later, the assigned probation officer obtained a warrant based on that failure to report. Whitaker was again picked up and held for a probation violation hearing. At the hearing in October 2022, Whitaker did not dispute the violation and requested his probation be continued so he could enter a "sober living" program to overcome his substance abuse problems. The record on appeal shows Whitaker had multiple convictions for property crimes and drug offenses, although the aggravated battery appears to have been his only conviction for a crime of violence. The State opposed the request and recommended Whitaker serve the 57-month prison sentence.

The district court found Whitaker had violated conditions of his probation and declined to order another jail sanction. Noting that no intermediate sanction was required because Whitaker had received a dispositional departure to probation on his second KORA conviction, the district court ordered him to serve the 57-month sentence. The district court pointed both to Whitaker's repeated failures to begin the probation process and to his refusal to take advantage of any community-based treatment programs sooner as strong indictors he was a poor candidate for another opportunity on probation. Whitaker has timely appealed.

ANALYSIS

For his sole claim on appeal, Whitaker asserts the district court abused its judicial discretion in refusing to reinstate his probation. Given Whitaker's criminal history, the district court's decision to place him on probation reflected an act of judicial leniency afforded him as a privilege rather than a right. See *State v. Gary*, 282 Kan. 232, 237, 144 P.3d 634 (2006). A district court's decision to revoke probation entails two steps: (1) a

factual determination, established by a preponderance of the evidence, that the probationer has violated a condition of probation; and (2) a discretionary determination as to the appropriate disposition in light of any proved violation. *State v. Skolaut*, 286 Kan. 219, Syl. ¶ 4, 182 P.3d 1231 (2008) (components of probation revocation); *State v. Gumfory*, 281 Kan. 1168, 1170, 135 P.3d 1191 (2006) (preponderance of evidence standard governs proof of probation violation).

A defendant's admission of an alleged violation satisfies the first step. Here, Whitaker admitted violating his probation when he failed to report to his probation officer in June 2022 after serving the three-day jail sanction for failing to report earlier in the year. The admission obviated the State's need to prove a probation violation. See *Gumfory*, 281 Kan. at 1170; *State v. Inkelaar*, 38 Kan. App. 2d 312, 315, 164 P.3d 844 (2007). After a violation has been established, the decision to reinstate probation or to revoke and incarcerate the probationer rests within the sound discretion of the district court subject to some statutory limitations. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022); see K.S.A. 2022 Supp. 22-3716(c)(1), (7). Judicial discretion has been abused if a decision is arbitrary, fanciful, or unreasonable or rests on a substantive error of law or a material mistake of fact. *State v. Meeks*, 307 Kan. 813, 816, 415 P.3d 400 (2018). Whitaker carries the burden of showing that the district court abused its discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Under K.S.A. 2022 Supp. 22-3716(c), a district court typically should impose a jail sanction for a probationer's initial violation rather than revoking the probation and ordering the prison sentence to be served. But at least two statutory exceptions to the general rule apply here. This was Whitaker's second probation violation in this case, and he had already received a jail sanction, so the district court had the authority to revoke for that reason. See K.S.A. 2022 Supp. 22-3716(c)(1)(C). And, as the district court noted, no jail sanction is required if a probationer has violated a condition of probation after

receiving a dispositional departure from presumptive imprisonment to probation. K.S.A. 2022 Supp. 22-3716(c)(7)(B).

On appeal, Whitaker concedes the district court understood both the relevant facts and the governing law. Rather, he argues the district court abused its discretion because the decision to revoke was so far afield that no other judge would have come to that conclusion in comparable circumstances. To support his position, he cites studies he says show that criminals with substance abuse problems tend to fare better in community treatment programs than in prison. And he says the cost to the State in maintaining a probationer is far less than the per capita cost of incarcerating that person. Whitaker did not present those specific policy arguments to the district court. Even if he had, they alone are insufficient to establish an abuse of discretion here.

This is not a case where a probationer missed one or even several scheduled meetings with his or her probation officers despite an otherwise good record of compliance. Those would commonly be called "technical violations" that do not necessarily point to revocation and imprisonment as a remedy. Whitaker, however, twice refused to engage in the probation process at all in this case. That reflects persistent indifference or recalcitrance of a much less excusable character. Similarly, Whitaker's criminal history and his pitch to the district court for continued leniency suggest a deep-seated substance abuse problem that he has been unable to address in a constructive way. Given those circumstances, we decline to say no other district court would have revoked Whitaker's probation and ordered him to serve his original sentence. Accordingly, the district court did not abuse its broad judicial discretion.

Affirmed.