

NOT DESIGNATED FOR PUBLICATION

No. 126,286

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ZACHARIAH MARTIN DITTRICK,
Appellant.

MEMORANDUM OPINION

Appeal from Barton District Court; CAREY L. HIPPI, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

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

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

PER CURIAM: Defendant Zachariah Dittrick appeals the Barton County District Court's decision revoking his probation and ordering him to serve his underlying prison sentence for aggravated arson. Dittrick asserts the district court abused its discretion by revoking his probation. We granted his motion for summary disposition under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). Seeing no error, we affirm the district court's decision.

FACTUAL AND PROCEDURAL HISTORY

In April 2019, Dittrick pleaded guilty to one count of aggravated arson, a severity level 6 person felony, committed in August 2018. Based on his criminal history, Dittrick faced presumptive imprisonment for a term of between 34 and 36 months under the sentencing guidelines. The district court ordered Dittrick to serve a 36-month sentence in June 2019 but granted his motion for a dispositional departure and placed him on probation for 24 months.

Dittrick had difficulties conforming to the conditions of probation. He served four jail sanctions ranging from 3 days to 120 days for successive probation violations. Each time, the district court extended the probation rather than revoking it and ordering Dittrick to serve the prison sentence.

In January 2023, the State again moved to revoke Dittrick's probation. The motion alleged: Dittrick admitted to ingesting methamphetamine in May 2022; failed to report law enforcement contacts within 24 hours to Tyler Lehmkuhl, his intensive supervision officer (ISO), after being arrested in October and December 2022; failed to report to community corrections after May 2022; and committed new crimes in a case recently filed in Lane County District Court. In the new case, the State charged Dittrick with criminal possession of a firearm, possession of methamphetamine, interference with law enforcement, and battery of a law enforcement officer.

In March 2023, the district court held a contested hearing on the motion to revoke. The State presented testimony from Lehmkuhl, Lane County Sheriff Bryan Kough, and Sheriff's Sergeant Zachary Orr. Dittrick neither testified nor offered other evidence during the hearing. Based on the testimony and other evidence, the district court found by a preponderance of the evidence that Dittrick violated the terms of his probation. See

State v. Gumfory, 281 Kan. 1168, 1170, 135 P.3d 1191 (2006) (burden on State to prove probation violations by preponderance of evidence standard).

In his testimony, Lehmkuhl briefly referenced the content of his affidavit outlining the probation violations and restated the accuracy of the affidavit. Lehmkuhl testified that after some initial difficulties on probation, Dittrick remained sober and complied with the other conditions for an extended time until his father died in early June 2021. According to Lehmkuhl, the death seemed to send Dittrick into a steep downward spiral from which he never recovered. Based on what appears to have been a standard practice in his office, Lehmkuhl recommended Dittrick be extended on probation and ordered to serve a 180-day jail sanction—an option open to the district court given when Dittrick committed the underlying aggravated arson. If Dittrick had been convicted of either the possession of a weapons charge or the battery of a law enforcement officer charge in Lane County at the time of the revocation hearing, Lehmkuhl would have recommended the probation be revoked and Dittrick serve the original sentence.

Sheriff Kough and Sgt. Orr testified to their involvement in a traffic stop in late December 2022, where Dittrick was a passenger in an SUV. Sgt. Orr initiated the stop and upon approaching the vehicle smelled burned marijuana and saw four men in the SUV. Dittrick was in the front passenger seat. There was a rifle propped on the center console next to the seat. A search of the vehicle turned up another firearm, drug paraphernalia, and methamphetamine. Other occupants of the vehicle admitted the firearms and various items of contraband belonged to them.

During the stop and before any other officers arrived, Sgt. Orr ordered the occupants out of the SUV. Dittrick did not readily comply and refused to remain seated on the curb as Sgt. Orr directed. When Sgt. Orr attempted to restrain Dittrick, he actively resisted and at some point grabbed the officer's protective vest. Sgt. Orr was able to get Dittrick prone on the street until other officers arrived.

After he arrived on the scene, Sheriff Kough took physical custody of Dittrick. While escorting Dittrick and another of the individuals to his vehicle, Sheriff Kough saw Dittrick drop a pack of cigarettes and kick it under the vehicle. Sheriff Kough recovered the pack and saw it contained what appeared to be a "rock" of methamphetamine in plastic wrap. The substance field-tested positive for methamphetamine.

Based on the evidentiary record, the district court specifically concluded Dittrick had used methamphetamine while on probation and failed to report for scheduled visits with his ISO, as alleged in Lehmkuhl's affidavit. Regarding the new charges from the Lane County case, the district court found by a preponderance of the evidence Dittrick committed those crimes, except for criminal possession of a firearm. The district court denied Dittrick's request for yet another jail sanction; it revoked Dittrick's probation and ordered that he serve the original 36-month prison sentence. Dittrick has filed a timely notice of appeal.

ANALYSIS

On appeal, Dittrick submits the district court abused its discretion by revoking his probation and ordering him to serve his underlying prison sentence. Appellate courts review a district court's decision to revoke probation for an abuse of discretion. *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020). 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. Bilbrey*, 317 Kan. 57, 63, 523 P.3d 1078 (2023). Dittrick bears the burden of showing an abuse of discretion. See *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

Here, the district court pointed to alternative grounds for its discretionary decision to revoke Dittrick's probation. First, the district court found it had discretion to revoke

because it had already imposed jail sanctions on Dittrick for his earlier violations. See K.S.A. 2022 Supp. 22-3716(c)(1)(C) (revocation permissible "if the violator already had a sanction imposed" for probation violation related to crime of conviction). Second, the district court found it could revoke because Dittrick had received a dispositional departure to probation. See K.S.A. 2022 Supp. 22-3716(c)(7)(B) (revocation permissible without previous sanction if "probation . . . was originally granted as the result of dispositional departure granted by the sentencing court"). The district court's reasoning was legally correct and factually supported in the record.

After a probation violation has been established, a district court has discretion to revoke probation, subject to a few statutory limitations. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022). None of those limitations apply here. So, while the district court had the discretion to allow Dittrick to remain on probation, it had no legal obligation to do so. See *State v. Brown*, 51 Kan. App. 2d 876, 879-80, 357 P.3d 296 (2015).

Dittrick does not suggest the district court made a legal error or misunderstood the controlling facts in deciding to revoke his probation. As we have said, the district court correctly applied the law and assessed the facts. Dittrick is left to argue the district court's decision was such that no other district court would have come to the same conclusion in comparable circumstances. The argument is, in a word, untenable.

Given Dittrick's serial violations of his probation, including committing new felonies and apparently failing to report for more than six months, the district court found Dittrick's asserted mitigating factors—largely the apparent effects of his father's death, about which there was little direct evidence—to be insufficient to warrant another extension of probation. Likewise, Lehmkuhl's recommendation cannot carry the day for Dittrick. A district court may consider such a recommendation, just as it does the respective arguments of the lawyers for the parties; but ultimately it must make an

independent assessment of the circumstances. Here, we readily conclude other district courts would have ruled the same way—revoking probation and ordering the original sentence be served. In short, the district court did not abuse its broad judicial discretion.

Affirmed.