

NOT DESIGNATED FOR PUBLICATION

No. 126,369

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAVIER AGUSTIN HERNANDEZ,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID L. DAHL, judge. Submitted without oral argument. Opinion filed December 22, 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 Javier Agustin Hernandez appeals the decision of the Sedgwick County District Court revoking his probation in two cases and ordering him to serve a controlling 62-month term in prison. Hernandez contends the district court abused its judicial discretion in refusing to continue him on probation or to reduce his prison sentence. We find no error and affirm the district court's ruling.

The district court handled the two cases jointly. In one case, Hernandez pleaded guilty to aggravated domestic battery, a severity level 7 person felony, as the primary crime of conviction, committed in March 2021. In that case, he also pleaded guilty to four other felonies, including possession of cocaine, and two misdemeanor counts of domestic

battery. The district court imposed a combination of concurrent and consecutive sentences on the felonies, yielding the umbrella prison sentence of 62 months. The district court imposed a six-month jail sentence on each misdemeanor to be served consecutively and consecutive to the prison sentence. In the second case, Hernandez pleaded guilty to two counts of violating the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., a severity level 6 person felony, committed in April and August of 2022. The district court sentenced Hernandez to serve a prison sentence of 31 months on one count to be served concurrently with a 19-month sentence on the second count with both to be served concurrently with the controlling sentence in the first case. At the joint sentencing hearing in October 2022, the district court granted Hernandez' motion for a downward dispositional departure in each case and placed him on probation for 24 months.

About three months later, the State alleged Hernandez violated the terms of his probation by committing new crimes, including felony drug offenses. The district court held a probation revocation hearing in February 2023. Hernandez admitted to committing a felony drug crime and acknowledged that violated his probation. Through his lawyer, Hernandez requested a 60-day sanction and continuation of his probation, citing his severe drug addiction and a willingness to seek treatment. Alternatively, he asked the district court to substantially reduce the time he would spend in custody on the original sentences. Based on Hernandez' commission of a new felony, the district court dispensed with any intermediate sanction and ordered Hernandez to serve the controlling 62-month prison sentence. The district court did order the misdemeanor jail sentences to be served concurrently with rather than consecutive to the prison time.

Hernandez has appealed. We consolidated the district court cases for appellate determination. And we have granted Hernandez' motion summary disposition of the appeal under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State has agreed that summary disposition is appropriate.

For his sole claim on appeal, Hernandez asserts the district court abused its discretion in refusing to reinstate his probation. Probation is an act of judicial leniency afforded a defendant as a privilege rather than a right. *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 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).

A defendant's admission of an alleged violation satisfies the first step. Here, Hernandez admitting violating his probation by committing a new felony, obviating the State's obligation to prove one or more violations by a preponderance of the evidence. See *State v. Gumfory*, 281 Kan. 1168, 1170, 135 P.3d 1191 (2006); *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. 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. Cameron*, 300 Kan. 384, 391, 329 P.3d 1158 (2014). Hernandez carries the burden of showing that the district court abused its discretion. See *State v. Stafford*, 296 Kan. 25, 45, 290 P.3d 562 (2012).

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. There are, however, several statutory exceptions to the general rule—pertinent here, the probationer's commission of a new crime permits the district court to bypass an intermediate sanction. K.S.A. 2022 Supp. 22-3716(c)(7)(C). The district court specifically referred to the new-crime exception in explaining its decision to revoke Hernandez' probation.

As Hernandez concedes, the district court understood both the relevant facts and the governing law. Hernandez is thus left to argue the district court abused its discretion because the decision to revoke was so far afield that no other judge would come to that conclusion in comparable circumstances. The argument is untenable. We are confident other district courts would have revoked Hernandez' probation given the range of crimes on which he received probation, his apparently intractable substance abuse problem, and his commission of a new drug felony. Moreover, we have often found no abuse of discretion when district courts revoke probationers who cannot overcome their chronic substance abuse outside of a prison setting. See *State v. Hawk*, No. 122,955, 2021 WL 299923, at *1 (Kan. App. 2021) (unpublished opinion); *State v. Bergman*, No. 120,423, 2020 WL 1074718, at *1 (Kan. App. 2020) (unpublished opinion); *State v. Ridge*, No. 122,408, 2020 WL 5268257, at *2 (Kan. App. 2020) (unpublished opinion); *State v. Zwickl*, No. 115,959, 2017 WL 2709799, at *3 (Kan. App. 2017) (unpublished opinion). On the same basis, we find no abuse of discretion in the district court's decision that Hernandez serve the 62-month prison sentence rather than some shorter period of incarceration.

Affirmed.