NOT DESIGNATED FOR PUBLICATION

No. 112,842

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

PHILLIP L. CLAPP,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed March 25, 2016. Affirmed.

Caroline M. Zuschek, of Kansas Appellate Defender Office, for appellant.

Daniel D. Gilligan, assistant distrtict attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., BUSER and SCHROEDER, JJ.

BUSER, J.: Phillip L. Clapp is serving a 118 month prison sentence after the Reno County District Court revoked his probation for a second time. For the first time on appeal, Clapp contends the district court lacked authority to revoke his probation. Upon our review of the record and the parties' briefs, we affirm the judgment of the sentencing court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2013, the State filed 13 drug, alcohol, and weapons charges against Clapp. In part, the State alleged that Clapp possessed methamphetamine, hydrocodone, and oxycodone with intent to sell and that he possessed two daggers and a pair of brass knuckles. The record shows that Clapp has an extensive criminal history dating from 1993 which includes numerous prior convictions on drug, alcohol, and weapons charges. In fact, Clapp testified that he was arrested on the current charges 4 months after his release from prison.

The presumptive sentence for the charges alleged in this case was imprisonment. The State, however, agreed not to oppose Clapp's motion for a dispositional departure to probation in exchange for a plea of guilty to all charges. Clapp was amenable to this plea agreement and upon his pleas of guilty the district court found him guilty as charged.

At sentencing on August 23, 2013, the district court followed the plea agreement and departed to a 36-month probation supervised by community corrections but it also imposed a 60-day jail sanction. When defense counsel told the district court that Clapp needed drug treatment, the district judge asked, "If I suspend a jail sanction is he going to be safe out on the street?" Defense counsel responded, "Judge, we want to go from jail to treatment." The district court therefore ordered that Clapp's 60 day jail sanction would be "suspended when you go to inpatient treatment." Clapp eventually entered inpatient drug treatment, completed it, and was released to outpatient treatment under intensive supervision by community corrections.

On January 27, 2014, the State moved to revoke Clapp's probation. The State alleged that Clapp tested positive for methamphetamine after denying use, failed to report numerous times, was unsuccessfully discharged from outpatient treatment, refused to

reenter treatment, refused to attend mental health treatment, failed to cooperate with several other programs, and left Reno County to visit a casino.

On February 7, 2014, a probation revocation hearing was held. Clapp appeared with his counsel and stipulated to the probation violations. After accepting the stipulation, the district judge asked defense counsel, "[T]ell me what we should do for disposition." Defense counsel argued prison was not the proper disposition because her client suffered from drug addiction and there were "still resources within the community." As a result, counsel requested a "180 day dip in the Department of Corrections and then [probation] reinstatement with a strong condition that he get his mental health eval[uation] and medication. We can get that under control we can control the addiction problems and hopefully we won't be here again."

The State argued for revocation of Clapp's probation. In particular, the prosecutor maintained that intensive supervision by community corrections had proven insufficient in Clapp's case:

> "That's why we give them a person to babysit them and make sure they do what they want them to do in order to insure that they don't harm our community by bringing drugs into this community like he had. He had so many different types of drugs I can't even name all of them to you right now . . . . I mean, he did a dangerous crime. He put our community at risk. We gave him a chance. . . . He does his inpatient [treatment]. Then after that he hits the ground and he takes off running and he's going to do whatever he wants to do while he's on this probation rather than do what he's supposed to do."

The district court granted defense counsel's request, imposed the 180-day intermediate sanction, and reinstated probation with community corrections for 36 months. The district judge explained to Clapp:

"I look at your [presentence investigation] PSI there's . . . 13 prior convictions . . . I have two batteries here, unlawful discharge of a firearm, criminal use of a weapon, criminal possession of a firearm, another criminal possession of a firearm so I got four gun [convictions] there and then in this case you got brass knuckles and two daggers so [there are] seven weapons violations here between this case and the prior cases plus attempt to flee and elude so someone could think that you're a dangerous person and then I look at [this] case . . . and you got . . . a whole drug store so it seems [to] me, Mr. Clapp, that . . . when you go in the ditch you . . . aim directly at the ditch and you go there as fast as you can go and when I read this motion to revoke here, kind of bears that out, so the question that I have in my mind is . . . do I take [defense counsel]'s suggestion and let you have a 180 day prison sanction or do I just try to protect the people of Reno County by just having this sentence executed and having you go for 10 or 12 years. . . .

"The other thing, I think you're a smart guy. You're not dumb but you really . . . don't make very good decisions so I'm hopeful that 180 days in the DOC will help. If it doesn't then I am not too proud to admit that I made a mistake."

Clapp did not appeal the district court's judgment.

Clapp was released on probation from his intermediate sanction. He was directed to report to his intensive supervision officer (ISO) twice a week, but he failed to report on 3 occasions during the first 2 weeks after his release. Soon, Clapp tested positive for methamphetamine, and he missed drug treatment sessions five times over the summer. Later in the summer he failed to report twice to his ISO and again tested positive for methamphetamine use. Clapp initially denied using methamphetamine; but after the positive test, he admitted to meeting "some girls at a bar and that he spent three days with them using meth." Clapp tested positive for methamphetamine again, and for 3 days he failed to contact his ISO as directed.

For the second time, the State moved to revoke Clapp's probation, and the district court held an evidentiary hearing. After recounting Clapp's violations, the ISO testified that Clapp was not attempting to comply with probation:

> "[Clapp] will come in and tell me that he does not want to go to treatment, he doesn't have a drug problem. I've offered reintegration. He refused to go to reintegration. He basically is noncompliant with most of the rules. He doesn't want to do them. I actually tried to go over a thinking report with him. He simply refused to answer the questions."

After Clapp testified on his own behalf, the prosecutor argued for revocation of probation. Defense counsel, however, maintained the central issue was Clapp's drug addiction and she asked that he remain on probation with community corrections. The prosecutor replied that Clapp was not cooperating with community corrections and that he also posed a threat to the community.

The district court revoked probation and imposed the underlying prison sentence. The district judge personally addressed Clapp to explain his decision:

> "Well, Mr. Clapp, the real question is whether or not I can with a straight face ask Community Corrections to continue to try to supervise you . . . . [You have] a dangerous criminal history. You got three weapons convictions in this case. Previously you have an unlawful discharge of a firearm, a criminal use of a firearm, criminal possession of a firearm, criminal possession of a firearm so four, so that makes . . . seven weapon [convictions] and you're convicted of basically being a drug dealer, and then you haven't been honest with your ISO and it seems to me at age 37 you should have figured out that that is what we call in Drug Court a proximal goal.
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> . . . .
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> ". . . I wish that you had taken and cherished your chance at Community Corrections but I really just get the feeling that you thought Community Corrections was something you were going to try to get through so that you could then go live your life the way that you wanted to. I never and I have today still not got the feeling that you actually valued Community Corrections as a way that could have some help in changing how you think, how you live your life so that you can be a productive law abiding citizen."

Clapp filed a timely appeal.

CORRECTION OF ILLEGAL SENTENCE UNDER K.S.A. 22-3504(1)

Clapp contends the district court's decision to revoke his probation for a second time constituted an illegal sentence under K.S.A. 22-3504(1). For its part, the State challenges Clapp's failure to raise this issue in the district court, but since "K.S.A. 22-3504(1) specifically authorizes a court to 'correct an illegal sentence at any time' . . . an illegal sentence may be considered for the first time on appeal." *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 1, 350 P.3d 1054 (2015).

Our appellate standard of review provides: "[W]hether a sentence is illegal is a question of law over which this court has unlimited review." *State v. Donaldson*, 302 Kan. 731, 734, 355 P.3d 689 (2015).

> "Under K.S.A. 22-3504(1), an illegal sentence is: (1) A sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served." 302 Kan. 731, Syl. ¶ 1.

Clapp argues that the second definition applies—that his sentence does not conform to the applicable statutory provision. Clapp identifies K.S.A. 2015 Supp. 22-3716 as the applicable statutory provision.

Our Supreme Court has instructed that "'[s]tatutory provision' as applicable to K.S.A. 22-3504(1) is the statute defining the crime and assigning the category of punishment to be imposed." *State v. Edwards*, 281 Kan. 1334, 1337, 135 P.3d 1251 (2006). Since K.S.A. 2015 Supp. 22-3716 is the probation violation sanctions statute, it does not define any of Clapp's crimes or assign the categories of punishment to be

imposed. Clapp's sentence, therefore, is not illegal under K.S.A. 22-3505(1). See *State v. Howell*, No. 111,746, 2015 WL 2414407, at *2 (Kan. App.) (unpublished opinion), *rev. denied* 302 Kan. ___ (September 14, 2015).

Clapp acknowledges *Edwards* but argues it was wrongly decided. We are bound, however, by the decisions of our Supreme Court absent some indication the court is departing from its precedent. See *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). We are unaware of any indication from the Supreme Court that it is departing from *Edwards*' precedent. And our Supreme Court continues to hold that K.S.A. 22-3504(1) has "'very limited applicability.'" *Makthepharak v. State*, 298 Kan. 573, 581, 314 P.3d 876 (2013) (quoting *Edwards*, 281 Kan. at 1336). *Edwards* is dispositive of this issue. Clapp has not shown how the district court's second revocation of his probation constituted an illegal sentence under K.S.A. 22-3504(1).

REVOCATION OF PROBATION IN VIOLATION OF K.S.A. 2015 SUPP. 22-3716

In the alternative, Clapp asserts the district court "erred by revoking [his] probation . . . without making the findings required by [K.S.A. 2015 Supp. 22-3716(c)(9)]." The State does not challenge Clapp's failure to raise this issue in the district court. Instead, the State argues that statutory findings were not required; and that, if they were required, the district court made the necessary findings.

We exercise unlimited review over the district court's compliance with the statute. See *State v. Bannon*, 45 Kan. App. 2d 1077, 1080, 257 P.3d 831 (2011), *rev. denied* 293 Kan. 1108 (2012).

Recent amendments codified in K.S.A. 2015 Supp. 22-3716 require imposition of intermediate sanctions before revoking probation unless the district court makes certain findings. See *State v. Kurtz*, 51 Kan. App. 2d 50, 54, 340 P.3d 509 (2014), *rev. denied*

302 Kan. ___ (September 23, 2015). Notably, the statute does not require findings where a probation violator has already served a 180-day intermediate sanction in the custody of the secretary of corrections. See K.S.A. 2015 Supp. 22-3716(c)(1)(E). Since Clapp had already served this sanction when the district court revoked his probation, we are persuaded the statutory findings were not required.

Clapp does not challenge the propriety of the 180-day intermediate sanction in this issue of his brief. Even if he had, we would not find reversible error. In February 2014, Clapp was facing the prospect of returning to prison at his *first* probation revocation hearing. Clapp's counsel proposed as an alternative that the district court impose the 180-day sanction. Assuming that 180-day sanction was somehow improper, Clapp may not invite the error and then complain of it on appeal. See *State v. Verser*, 299 Kan. 776, 784, 326 P.3d 1046 (2014).

Finally, as detailed in the Factual and Procedural Background section of this opinion, the district court stated at *both* revocation hearings its concerns about the danger Clapp posed to the community. In particular, the district court noted Clapp's "dangerous criminal history" and then listed his individual convictions which included three weapons convictions in the current case, a prior unlawful discharge of a firearm, criminal use of a firearm, two convictions for criminal possession of a firearm, and convictions for "basically being a drug dealer." The district court also heard testimony that Clapp had wholly failed to comply with his probation supervision provided by community corrections. This resulted in the district judge finding, "I never and I have today still not got the feeling that you actually valued Community Corrections as a way that could have some help in changing how you think, how you live your life."

In summary, assuming statutory findings were required before revoking Clapp's probation the second time, we conclude the requirement that "the court finds and sets forth with particularity the reasons for finding that the safety of members of the public

will be jeopardized," was met by the district court in this case. See K.S.A. 2015 Supp. 22-3716(c)(9).

Affirmed.