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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0053**

State of Minnesota,
Respondent,

vs.

Donald Poillon,
Appellant.

**Filed April 15, 2008
Affirmed
Klaphake, Judge**

Winona County District Court
File No. K9-01-0745

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Philip Marron, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

On appeal from the district court's order revoking his probation and executing a 72-month sentence for conspiracy to commit first-degree controlled substance crime, appellant Donald Poillon asserts that (1) the district court erred in concluding that no further jail time could be imposed as an intermediate sanction for his probation violations; (2) the district court abused its discretion in revoking appellant's probation because the evidence did not demonstrate that the need to confine him outweighed the policies favoring his continued placement on probation; and (3) the district court erred in determining jail credit because his participation in a residential treatment program was the functional equivalent of jail time. Although we agree that the district court erred as a matter of law in concluding that appellant could not receive more jail time as a sanction for violating probation, we conclude that the district court did not abuse its discretion in revoking appellant's probation because there was strong evidence to support revocation. We further observe no abuse of discretion in the district court's calculation of jail credit where the record evidence shows that appellant's placement in a residential treatment program was not the functional equivalent of jail time.

DECISION

Imposition of Jail Time as Probation Violation Sanction

If a probationer violates conditions of probation, the district court may revoke probation and execute the sentence previously imposed or order intermediate sanctions.

Minn. Stat. § 609.14, subd. 3(2) (2004). Before revoking probation, the district court must (1) specify the condition that was violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the rehabilitative policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). “The decision to revoke cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender’s behavior demonstrates that he or she cannot be counted on to avoid antisocial activity.” *Id.* at 251 (citations omitted). This court will reverse a probation revocation decision only for a clear abuse of the district court’s discretion. *Id.* at 249-50.

Appellant first asserts that the district court erroneously concluded that it could not impose further local jail time as an intermediate sanction for his most recent probation violations because he had served, cumulatively, 464 days of jail time during the probationary period. Minn. Stat. § 609.135, subd. 4 (2004), allows for imposition of local jail time of “up to one year” as a condition of probation. If grounds exist to revoke a stay of a previously imposed sentence, the sentence may be either continued as stayed or executed, or the court may order “intermediate sanctions in accordance with the provisions of 609.135[.]” Minn. Stat. § 609.14, subd. 3(2).

In *State v. Johnson*, 743 N.W.2d 622 (Minn. App. 2008), this court ruled that a district court’s interpretation of Minn. Stat. § 609.135, subd. 4, as limiting its authority to impose cumulative local jail time of over a year for probation violations was erroneous, “because there is a distinction between imposing jail as a condition of probation and imposing jail for violating probation[.]” and “the statute neither states nor implies that

there is a limit to the cumulative amount of local jail time a district court may impose as a consequence of probation violations.” *Id.* at 626. This court reversed and remanded for resentencing because the district court relied “heavily” on its erroneous interpretation of Minn. Stat. § 609.135, subd. 4. *Johnson*, 743 N.W.2d at 626.

Likewise, here, the district court erred in concluding that Minn. Stat. § 609.135, subd. 4, precluded it from imposing additional local jail time as a consequence of appellant’s most recent probation violations. We decline to remand this case for resentencing, however, because the record demonstrates that the court properly relied on the *Austin* factors in deciding to revoke appellant’s probation, and the underlying record supports the district court’s decision.

During the period of more than three years that appellant was placed on probation and not subject to residential treatment, appellant committed probation violations that were more serious and greater in number than the violations that occurred in *Johnson*. Appellant had multiple violations: having positive test results for the presence of controlled substances or alcohol, refusing such testing, possessing a dangerous weapon, and failing to report to and being untruthful to his probation agent. At his June 1, 2006, probation revocation hearing, the district court ordered appellant to be held in jail until sentencing but allowed him 24 hours to report to jail, noting that he was placing appellant in jail “for his own good.” Despite this precaution and the district court’s warning to appellant that another violation would result in revocation of his probation and execution of the original sentence, appellant tested positive for cocaine when he reported to jail on June 3, 2006. Appellant’s violations were more egregious than the limited violations in

Johnson, which consisted of a positive controlled substance test, failure to make restitution, and failure to report to jail for intermediate sanctions for probation violations. *Id.* at 624.

Unlike the district court's decision in *Johnson*, the district court's decision to revoke appellant's probation in this case was less dependent on the erroneous interpretation of Minn. Stat. § 609.135, subd. 4. Here, the court made each of the required *Austin* findings and elaborated on the basis for its decision on the third factor, whether the need for confinement outweighed policies favoring probation. It is clear from these findings that the district court's decision was not "reflexive." The court stated that appellant could "best" succeed in some of the structured treatment programs offered by the department of corrections and that "it would unduly depreciate the seriousness of [his] violations if probation were not now revoked." *See State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (district court may revoke if it finds the offender is in need of correctional treatment). Under these circumstances, we conclude that the district court's decision did not constitute an abuse of discretion. *See, e.g., State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming probation revocation where defendant's refusal to comply with treatment program and participate in recovery constituted violation of probation), *review denied* (Minn. Feb. 13, 1987).

Calculation of Jail Credit

Appellant next contends that the district court erred in denying him jail credit for the 13 months that he was placed in residential chemical dependency treatment at the Minnesota Teen Challenge Program. "Fairness and equity require that jail credit be

granted where a residential-treatment facility is the functional equivalent of a jail, workhouse, or regional correctional facility.” *State v. Fields*, 679 N.W.2d 341, 349 (Minn. 2004); *Asfaha v. State*, 665 N.W.2d 523, 527-28 (Minn. 2003). In making this determination, a district court “must look closely at the facts of the case presented.” *Asfaha*, 665 N.W.2d at 528; *see State v. Razmyslowski*, 668 N.W.2d 681, 684 (Minn. App. 2003) (noting that “district courts must look closely at the facts to determine the level of confinement and limitations imposed on a defendant”). This court applies the clear error standard of review to a district court’s determination of whether a probationer’s confinement has met the functional equivalency test for purposes of calculating jail credit. *Asfaha*, 665 N.W.2d at 526.

The district court summarily denied jail credit for time appellant spent in residential treatment after learning that during the program there was a period that appellant “was unaccounted for,” that appellant later returned to the program, and that “[t]here was no discipline for him leaving.” According to the state, appellant also “got passes to Winona during those 13 months[.]” On these facts, the district court properly concluded that the level of confinement and limitations imposed on appellant did not constitute the functional equivalent of prison. While appellant argues that the threat of probation revocation restricted him from leaving the program, the record supports the district court’s ruling, which is consistent with the supreme court’s focus on actual physical restrictions and confinement. *See Asfaha*, 665 N.W.2d at 527-28; *see also Fields*, 679 N.W.2d at 349 (affirming denial of jail credit request when structured residential treatment program was not the functional equivalent of incarceration).

Affirmed.