STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1804

State of Minnesota,
Respondent,

vs.

David J. Julkowski,
Appellant.

Filed August 5, 2008
Reversed and remanded
Klaphake, Judge

Anoka County District Court
File No. K0-02-6076

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, 7th Floor, Anoka, MN 55303 (for respondent)

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

Considered and decided by Wright, Presiding Judge; Klaphake, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant David Julkowski challenges the district court's decision to revoke his probation instead of imposing an intermediate sanction. Because this court recently determined that the sentencing statute does not restrict the cumulative amount of local jail time a district court may impose as a consequence of probation violations, we agree the district court erred by concluding that it did not have discretion to impose additional local jail time as an intermediate sanction. *See State v. Johnson*, 743 N.W.2d 622 (Minn. App. 2008). Accordingly, we reverse and remand.

D E C I S I O N

If a probationer violates conditions of probation, the district court may revoke probation and execute the sentence previously imposed. Minn. Stat. § 609.14, subd. 3(2) (2006). Before revoking probation, the district court must: (1) specify the condition or conditions that were 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). Revocation cannot be an impulsive response to numerous probation 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 (quotations omitted). This court will reverse a probation revocation decision only for a clear abuse of the district court's discretion. *Id.* at 249-50. Probation should not be imposed impulsively but only as a last resort when treatment has failed. *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007).

Appellant contends that the district court erroneously concluded that it "had used up any local sanction time it could impose" for his probation violation because it had imposed, cumulatively, 365 days of jail time during appellant's probationary period. Minn. Stat. § 609.135, subd. 4 (2006) allows for imposition of jail time "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). The question presented is whether the limitation of "up to one year" refers to local jail time in aggregate or only to the amount a court can impose at any one time.

This court recently decided this issue in *State v. Johnson*, 742 N.W.2d 622, 626 (Minn. App. 2008), ruling that Minn. Stat. § 609.135, subd. 4, does not limit the cumulative amount of local jail time a district court may impose as a consequence of probation violations, but merely limits the amount of local jail time a district court can impose "at one time." *Id*. The court remanded for resentencing concluding the district court relied "heavily" on its mistaken interpretation of Minn. Stat. § 609.135, subd. 4, in deciding to revoke probation.

In the present case, appellant initially pled guilty to the amended count of conspiracy to manufacture methamphetamine, and was sentenced on October 18, 2002 to a 98-month commitment to the Department of Corrections execution stayed, 20 years probation—conditions of which included 365 days local jail time, and urinalysis upon request. Over the next five years, appellant admitted to violating his probation on three

separate occasions: July 27, 2005, June 14, 2006, and June 21, 2007. At the first continued probation violation hearing on November 1, 2005, appellant's probation was continued because he had successfully followed the court's recommendations from the violation hearing, including remaining chemical free, paying for UA tests, securing employment, completing halfway house placement and obtaining sober housing.

At the second probation violation hearing held on June 14, 2006, appellant admitted to using methamphetamine, but the district court continued probation because appellant was attending GED classes, was voluntarily performing community service, and submitted letters of support from his employers and instructors. The district court, defense counsel, and the prosecutor all agreed that only 13 more days of local jail time were available as an intermediate sanction because appellant already had served 231 days local jail time as a condition of his original probation sentencing. Thus, the district court ordered appellant to serve 13 days in jail, among other conditions of continued probation, including weekly urinalysis tests. The court stated, "this is the last chance. . . . Any violation coming back to me, even minor, I'm going to execute the sentence."

At the third probation violation hearing on June 21, 2007, again based on a positive urinalysis tests, the district court revoked probation in part because it believed it could not order any more local jail time because it had already ordered an aggregate of one year jail as prior intermediate sanctions, stating:

> At the last violation . . . I told you that was your last chance. And in part that was because I had used up any local sanction time I could impose. I can't give you any more local jail time as a sanction. My choices are, essentially, to do nothing and

> put you back on probation or execute the sentence and commit you to the Department of Corrections.

The district court found that the benefits of probation did not outweigh the need for incarceration, revoked probation and executed the sentence of 98 months with credit for time served.

Following *Johnson*, we conclude that the district court here mistakenly concluded that appellant could not have received additional local jail time as a probation violation sanction. If a court misapplies the law, even if based on an honest misconstruction of a statute, it is still an error of law. Here, even though the district court was not in a position to appreciate our decision in *Johnson*, its mistaken interpretation of the sentencing statute still constitutes error.

We must also determine whether the record contains sufficient evidence to warrant the revocation pursuant to *Austin*, or whether the district court relied so heavily on its mistaken interpretation of the sentencing statute as to justify remanding the case for resentencing. Appellant argues he is entitled to a new hearing because (1) the district court's decision to revoke probation was premised in large part on it mistaken belief that it could not impose any more local jail time, (2) the district court failed to hear testimony or consider other intermediate sanctions, and (3) the error in viewing revocation of appellant's probation as the only viable option rendered the court's analysis of the third *Austin* factor impulsive and hollow.

Due process mandates that a defendant be given the occasion to present mitigating circumstances that support continued probation rather than revocation. *State v. Cottew*,

746 N.W.2d 632 (Minn. 2008). Defense counsel submitted to the court letters from employers, parents, and rehabilitation workers supporting appellant's request for more probation time. Defense counsel also argued that the full 98 months sentence should not be imposed in light of appellant's successes—appellant was employed full time, completed his GED, completed treatment, and the violation was relatively minor, a positive UA. Appellant had ample opportunity to and did submit compelling evidence of mitigating factors.

Public policy further favors continued probation unless the court finds "(i) confinement is necessary to protect the public from further criminal activity by the offender; (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked." *Austin*, 295 N.W.2d at 250-51; *Cottew*, 746 N.W.2d at 632. Here, the district court did not address any of these three considerations specifically. Rather, the district court made a bare bones recital of the *Austin* factors, accepted appellant's admission of drug use as an unexcused, intentional violation, and generally stated that appellant did not take advantage of the benefits of probation and thus, the need for confinement outweighed the benefits probation may provide. The district court reflected on the prior revocation hearings—noting it had told appellant at the prior hearing that this was "his last chance"—in part because it believed there was no intermediate sanction jail time left to impose and again stating its only choice was "to do nothing" and continue probation or to execute the sentence. Not willing to "do nothing,"

the district court found that the benefits of probation were outweighed by the need for incarceration.

It is not clear to us that the district court would have reached the same decision had it been aware that the sentencing statute did permit additional jail time as an intermediate sanction for the probation violations. Nor do we suggest that a different decision is warranted upon resentencing. We conclude that not exercising discretion because the district court did not think it had any is still an abuse of discretion. For this reason alone, we hold that the district court abused its discretion in revoking probation.[1]

Reversed and remanded.

[1] By order filed July 9, 2008, this court granted appellant's motion to accept an informal supplemental brief discussing whether this court should consider, as part of the record, a letter sent by the district court judge to the department of corrections in response to an inquiry regarding an early release program. While that letter is included in the district court file submitted to this court on appeal, it was written almost two months after the district court's June 21, 2007, decision revoking appellant's probation. In addition, a copy of the letter was never sent to appellant, the letter was never stamped as "filed" or "received" by the district court administrator, and the letter does not appear as an entry on the district court's register of actions. Because the letter is not properly part of the record on appeal and because this court may not base its decision on matters outside the record on appeal, we will not consider the letter or its contents. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988); Minn. R. Civ. App. P. 110.01.