STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1576

State of Minnesota,
Respondent,

vs.

Todd C. Myers,
Appellant.

Filed October 28, 2008
Affirmed
Johnson, Judge

Anoka County District Court
File No. KX-93-1605

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

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, Judge.[*]

[*]Retired judge of the Minnesota Court of Appeals, serving 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

JOHNSON, Judge

In 1993, Todd C. Myers pleaded guilty to first-degree and third-degree criminal sexual conduct. The district court imposed consecutive prison sentences of 86 months and 18 months but stayed execution and placed Myers on probation for 15 years. In 2007, the district court revoked Myers's probation and executed the sentences because Myers failed to complete a chemical-dependency evaluation, failed to remain law-abiding, possessed pornographic material, and used alcohol. The district court also imposed a five-year term of conditional release. On appeal, Myers challenges both the revocation of his probation and the term of conditional release. We conclude that the district court did not abuse its discretion by revoking Myers's probation and executing the sentence or by imposing the five-year term of conditional release and, therefore, affirm.

FACTS

In January 1993, when he was 28 years old, Myers hosted a party for juveniles at his apartment in the city of Blaine. He provided alcohol to juveniles in attendance and, over the course of the evening, sexually assaulted two girls and one boy between the ages of 11 and 13. The state charged Myers with four counts of criminal sexual conduct: one count of first-degree criminal sexual conduct, two counts of third-degree criminal sexual conduct, and one count of attempted second-degree criminal sexual conduct.

In June 1993, pursuant to a plea agreement, Myers pleaded guilty to the first and third counts, first-degree and third-degree criminal sexual conduct. In consideration of

his guilty plea, the state dismissed the two remaining counts. At the plea hearing, the prosecutor stated, "The plea agreement contemplates a guidelines sentence. All terms and conditions will be left up to the court."

In August 1993, the district court imposed consecutive, stayed sentences of 86 months on count one and 18 months on count three. The district court also placed Myers on probation for 15 years, subject to the rules of the county corrections department and the further condition that he "remain law-abiding and of good behavior."

During his probation, Myers appeared before the court four times on allegations of probation violations. First, in October 1995, Myers admitted that he had failed to pay a fine as required and had failed to complete a pre-treatment, psycho-educational, sexual-behavior evaluation. The district court continued Myers on probation and continued the stay of execution. Second, in June 1996, Myers admitted that he had failed to complete treatment and counseling and had failed to remain law-abiding and of good behavior. The district court again continued Myers on probation and continued the stay of execution. Third, in October 2006, Myers admitted that he had failed to remain law-abiding because he had been charged with fifth-degree domestic assault. The district court once again continued Myers on probation and continued the stay of execution.

Myers's fourth appearance on an allegation of a probation violation was on May 18, 2007. The state alleged that Myers failed to complete a chemical-dependency evaluation, failed twice to remain law-abiding, possessed pornographic material, and used alcohol. The allegations of not remaining law-abiding were that Myers pleaded guilty to violating a no-contact order and to disorderly conduct and that he was being

charged with gross-misdemeanor indecent exposure. Myers contested the violations, but the district court found by clear and convincing evidence that Myers had violated the conditions of his probation. The district court also found that Myers was not amenable to probation and was a threat to public safety. Accordingly, the district court executed the 86-month stayed sentence, with credit for 380 days served, and the consecutive 18-month sentence, with credit for 60 days served. The district court also imposed a five-year term of conditional release based on count one. Myers appeals.

D E C I S I O N

I. Revocation of Probation

Myers first argues that the district court abused its discretion when it revoked his probation and executed his stayed, consecutive sentences. The Minnesota Supreme Court has established a three-step analysis that a district court must complete before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); *see also State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The district court must (1) designate the specific condition of probation that has been violated, (2) find that the violation was intentional or inexcusable, and (3) find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. Whether the district court made the findings necessary to revoke probation is a question of law, which this court reviews de novo. *Modtland*, 695 N.W.2d at 605. The findings must be made in writing, but this requirement is satisfied by the district court stating its findings on the record. *Id.* at 608 n.4 (citing *Pearson v. State*, 308 Minn. 287, 292, 241 N.W.2d 490, 493 (1976)). "The trial court has broad discretion in determining if there is sufficient evidence to revoke

probation and should be reversed only if there is a clear abuse of that discretion." *Austin*, 295 N.W.2d at 249-50.

A. First *Austin* Factor

The district court found that Myers had violated the conditions of his probation by failing to complete a chemical-dependency evaluation, failing to remain law-abiding, possessing pornographic material, and using alcohol. Myers does not argue that the district court erred in designating the specific conditions of probation that were violated or in finding that the violations occurred.

B. Second *Austin* Factor

Myers argues that the district court erred by finding that he intentionally and inexcusably violated the terms and conditions of his probation. After finding that Myers violated his probation conditions, the district court found, "They're deliberate, they're willful and intentional."

1. Chemical-Dependency Evaluation

Myers was ordered to complete a chemical-dependency evaluation as early as October 2006. He had failed to complete the required course at the time of the revocation hearing seven months later. Myers argues that his failure to complete a chemical-dependency evaluation is excusable because he did not have time to complete it. More specifically, he argues that because he was arrested following the March 22, 2007, search of his residence, he was prevented from completing the evaluation that the probation department ordered him on March 6, 2007, to complete within 30 days.

The district court found that Myers had ample time to complete the chemical-dependency evaluation. The district court stated that "[d]espite repeated efforts and reminders" since October 2006 to get a chemical-dependency evaluation and complete the recommended treatment, Myers "blew it off." Myers did not dispute that the requirement was imposed on him in October 2006 or that he failed to comply between October 2006 and March 2007. Thus, the district court did not abuse its discretion by finding that Myers had intentionally and inexcusably failed to complete a condition of his probation. *See State v. Johnson*, 679 N.W.2d 169, 177 (Minn. App. 2004) (holding that failure to complete chemical-dependency evaluation, where no extenuating circumstances existed, was inexcusable).

2. Failure to Remain Law-abiding

When the district court originally placed Myers on probation in August 1993, the district court ordered him to "remain law-abiding and of good behavior." The district court found that since 1993, Myers had returned to court "repeatedly," making particular note of his October 2006 offense of disorderly conduct, which arose from an amended charge after he originally was charged with domestic assault.

Myers argues that his convictions for disorderly conduct and violation of a no-contact order were simply misdemeanors that already had been addressed by the district court at earlier hearings. Myers makes no argument that his failure to remain law-abiding was unintentional or excusable, and no evidence to that effect was presented to the district court. Because he pleaded guilty to misdemeanor offenses and was in the process of being charged with indecent exposure, the district court did not abuse its discretion in

finding that Myers had intentionally and inexcusably violated his probation conditions by failing to remain law-abiding.

3. Possession of Pornography

Pursuant to conditions of probation imposed in October 2006, Myers was not to "use, purchase, or possess pornography, erotica or any other sexually explicit material." The district court found that Myers "had possession and control" of pornographic magazines in his bedroom closet, on the table next to his bed, and in the bathroom in his house.

Myers argues that the pornographic materials found in his residence, which concerned adults, were not related to his underlying offenses, which involved minors, and that the materials were lawful to possess but for his convictions. The conditions of probation do not distinguish between pornography involving minors and pornography involving adults. Because Myers was found to possess pornography at the time of the March 22, 2007, search of his home, he violated the terms of his probation, and the district court did not abuse its discretion in finding that his violation was intentional and inexcusable.

4. Use of Alcohol

The district court found that the probation officer who visited Myers's home in March 2007 found numerous empty cans and "half-a-can of beer, cold, in the credenza, hidden away." The district court also noted that Myers had alcohol on his breath and that he admitted to the detective that he had been drinking.

Myers argues that his use of alcohol was excusable because his drinking was confined to his residence and because there is no evidence that he provided alcohol to minors. Myers acknowledges that he was prohibited from consuming alcohol under the terms of his probation, but he asserts that "the relatively small amount he consumed," which registered an alcohol concentration of only .038, "was not substantial enough to require incarceration."

Myers's conditions of probation prohibited use of "mood altering chemicals including alcohol." Thus, the consumption of even a small amount of alcohol is a violation of a condition of his probation. The district court acknowledged that Myers should not go to prison solely for consuming half a can of beer, thus indicating that this violation was less serious than the other violations. The district court did not abuse its discretion in finding that Myers intentionally and inexcusably used alcohol in violation of the terms of his probation and in considering that violation in the manner in which it did.

C. Third *Austin* Factor

Myers argues that the district court abused its discretion when it revoked his probation because, as he asserts, he had succeeded while on probation. More specifically, Myers points out that he worked as a pipe fitter, maintained a residence, and kept in contact with his probation officer. He also asserts that his use of alcohol could have been addressed through treatment in the community.

"There must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Austin*, 295 N.W.2d at 250. The decision to revoke cannot be "a reflexive reaction to an accumulation of technical

violations" but, rather, requires a showing that the "offender's behavior demonstrates that he or she 'cannot be counted on to avoid antisocial activity.'" *Id.* at 251 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479, 92 S. Ct. 2593, 2599 (1972)) (other quotation omitted). The third factor is satisfied if:

> "(i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (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."

Id. at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). Thus, imprisonment may be justified even if only one of these factors is met. *See id.*

The district court reinstated Myers's probation on each of the three prior occasions he appeared in district court on probation violations. But on the fourth occasion, the district court found that Myers's "patterns are established, ingrained" and that he is a "threat to the public safety." The district court concluded that Myers is not amenable to probation. In light of Myers's failure to abide by the conditions of his probation after having received three prior "second chances," we cannot find error. The district court's decision is justified by each of the three policy goals that motivate the third *Austin* factor. *See id.* (citing A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). Thus, the district court did not abuse its discretion in finding that the third *Austin* factor is satisfied and in revoking probation.

II. Conditional Release

Myers argues that the district court's imposition of a five-year term of conditional release exceeds the upper limit of the plea agreement accepted by the district court. Because Myers's sentence depends on the interpretation of statutes and sentencing guidelines, we conduct a de novo review. *See State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007).

Myers frames his argument in terms of the validity of his guilty plea. He cites cases arising from motions to withdraw guilty pleas; the cited cases generally stand for the proposition that an offender may be permitted to withdraw a guilty plea if there has been a breach of a plea agreement. *See James v. State*, 699 N.W.2d 723, 730 (Minn. 2005); *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000); *Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979). But Myers did not file a motion to withdraw his guilty plea in the district court.

Nonetheless, even in the absence of a motion to withdraw his guilty plea, Myers may seek a modification of his sentence on the ground that the conditional release term was imposed in violation of the plea agreement. *See James*, 699 N.W.2d at 730; *State v. Wukawitz*, 662 N.W.2d 517, 526 (Minn. 2003). But Myers was not induced to plead guilty by an unfulfilled promise of a specified sentence. At the plea hearing, the prosecutor stated that the plea agreement "contemplates a guidelines sentence. All terms and conditions will be left up to the court." Thus, this case is different from *James* and *Wukawitz* because imposition of the conditional-release term is not inconsistent with Myers's plea agreement.

Myers does not argue that the district court erred in May 2007 on the ground that the five-year term of conditional release is contrary to state statutes or sentencing guidelines. In fact, Myers acknowledges that, at the time he committed the underlying offenses in 1993, Minnesota law required a district court to impose a five-year term of conditional release when sentencing a person for certain criminal sexual conduct convictions. Minn. Stat. § 609.346, subd. 5(a) (1992). The version of the Minnesota Sentencing Guidelines in effect at the time of the sentencing hearing similarly provided, with respect to those types of convictions, that "the court shall provide that after the person has completed the sentence imposed, the commissioner of corrections shall place the person on conditional release for five years, minus the time the person served on supervised release." Minn. Sent. Guidelines cmt. II.E.05 (1993).

Thus, the district court did not err by imposing a five-year term of conditional release.

Affirmed.