STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2448

State of Minnesota,
Respondent,

vs.

Scott William Palmer,
Appellant.

Filed January 6, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-06-054620

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Y. Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal challenging the revocation of his probation, appellant argues that his use of alcohol was a technical violation that did not justify the revocation. We affirm.

FACTS

Appellant Scott William Palmer was convicted of driving while impaired (DWI) in September 1999, October 2000, and November 2005. After appellant drove his car into a utility pole on August 4, 2006, he was arrested and charged with two counts of felony first-degree DWI. A preliminary screening test showed an alcohol concentration of .19. Appellant pleaded guilty to one count of felony first-degree DWI.

The presentence investigation report (PSI) noted appellant's previous treatment failures, expressed great concerns about public safety, and concluded that appellant was at a high risk to reoffend. Consistent with the terms of the plea agreement, the district court sentenced appellant to 42 months in prison, stayed execution, and placed appellant on probation for five years. Probation conditions included no use of alcohol or controlled substances; participate in a psychological evaluation and follow all resulting recommendations; complete chemical-dependency treatment and/or aftercare and attend Alcoholics Anonymous weekly.

After being released from jail in January 2007, appellant lived with his parents. Appellant completed chemical-dependency treatment in May 2007 and aftercare in July 2007. At the beginning of August 2007, appellant moved into his own apartment.

On August 5, 2007, police were called to appellant's apartment, where they found him intoxicated. Testing showed that appellant had an alcohol concentration of .33. The police brought appellant to a hospital.

Appellant was discharged from the hospital on August 8, 2007. The same day, police were called to appellant's apartment, where they found him intoxicated. Testing showed that appellant had an alcohol concentration of .27.

Appellant was taken to the hospital a third time on August 10, 2007. Testing showed an alcohol concentration of .18. Appellant also tested positive for cocaine that day.

After appellant's probation officer learned about these incidents, a warrant was issued for appellant's arrest. Appellant did not contact his probation officer about the incidents before he was arrested.

At the probation-revocation hearing, appellant admitted that he violated his probation conditions by drinking on three separate occasions in August 2007. Appellant testified:

> [A]ll of sudden things were going so good for me, like my apartment, my daughter, I had a good job, people were liking me again, I was sober since October 23. That – I was happy enough I could just go and get a pint. . . . I just couldn't stop then after I got that one pint.

The district court found that appellant violated his probation conditions by drinking alcohol. Based on appellant's admission that he went to get a pint, which indicated that appellant was focused on getting intoxicated, the district court found that the violation was intentional and inexcusable. The court noted that appellant has had numerous treatment failures and understood the risk of taking a drink. The district court found that confinement was necessary to protect the public from further criminal activity and that treatment could be

most effectively provided if appellant was confined. The district court revoked appellant's probation and executed the 42-month sentence. This appeal followed.

D E C I S I O N

Generally, the district court has broad discretion when determining whether probation has been violated and will not be reversed absent an abuse of discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). When the district court finds that violation of the conditions of probation provides grounds for revocation, it may order execution of the previously stayed sentence. Minn. Stat. § 609.14, subd. 3(2) (2008); *see also* Minn. R. Crim. P. 27.04, subd. 3(3)(b) (stating court may order execution of sentence if it finds conditions of probation have been violated). In revocation proceedings, the state must present clear and convincing evidence that the probationer has violated conditions of probation and that probation should therefore be revoked. *Id.*, subd. 3(3).

Before revoking probation, the district court must (1) designate the specific probation condition or conditions violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)).

Appellant admitted violating probation by drinking on three occasions in August 2007. But appellant argues that the evidence was insufficient to prove by clear and convincing evidence that his violation was intentional or inexcusable. However, appellant admitted making the decision to buy a pint and drink, and as the district court found, appellant has had numerous treatment failures and understood the risk of taking a

drink. Also, as the district court noted, appellant's decision to buy a pint indicates intent to become intoxicated. Appellant did not use the techniques that he learned in treatment, such as calling a support person, and he did not contact his probation officer about the relapse. The district court did not err in finding that appellant's violation was intentional and inexcusable. *See In re Welfare of J.K.*, 641 N.W.2d 617, 621 (Minn. App. 2002) (upholding finding that violations were intentional and inexcusable when offender deliberately and repeatedly refused to comply with probation requirements or take advantage of treatment opportunities and instead continued to engage in behaviors that led to EJJ status).

The third *Austin* factor is satisfied if "confinement is necessary to protect the public from further criminal activity by the offender; or . . . it would unduly depreciate the seriousness of the violation if probation were not revoked." *Austin*, 295 N.W.2d at 251. "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.* (quotations omitted).

Appellant argues that this was his first probation violation and it was a technical violation rather than one involving new criminal activity. But although this was his first probation violation, appellant has a long history of treatment failures. And although appellant's drinking was not a crime, drinking was the underlying conduct in his earlier and current criminal offenses, and his four DWI convictions, which arose from his drinking, indicate that appellant's continued drinking is a threat to public safety. Also, this was a serious violation in that appellant was taken to the hospital three times between

August 5 and August 10 with alcohol concentrations ranging from .18 to .33, and the last time that he was taken to the hospital, he had cocaine in his system. These facts support the district court's finding that confinement is necessary to protect the public from further criminal activity.

Appellant argues that he should have been given another chance because he did well on probation for eight months. But appellant relapsed within one month after completing aftercare and shortly after moving into his own apartment.

In light of appellant's history of drinking and driving and his numerous treatment failures, the district court did not abuse its discretion in revoking appellant's probation. *See State v. Osborne*, 732 N.W.2d 249, 256 (concluding that district court had discretion to revoke probation after "full review of [offender's] lengthy history of criminal activity and chronic probation and treatment failures"); *State v. Hemmings*, 371 N.W.2d 44, 46-47 (Minn. App. 1985) (affirming probation revocation when evidence supported district court's finding that offender was "unamenable to treatment").

Affirmed.