STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1065

State of Minnesota,
Respondent,

vs.

David James Cotten,
Appellant.

Filed June 30, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-01-035658

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; 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 Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, 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

WORKE, Judge

On appeal from the district court's revocation of his parole and the imposed sentence, appellant argues that the district court abused its discretion by (1) revoking his probation because the evidence did not establish that the need for confinement outweighed the policies favoring probation; and (2) ranking his unranked offense at a severity level V. We affirm.

D E C I S I O N

Appellant argues that the district court abused its discretion when it revoked his probation. "The [district] 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." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). The Minnesota Supreme Court has established a three-step analysis that the district court must consider before revoking probation. *Id.* at 250; 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. *Id.* Whether the district court made the findings necessary to revoke probation is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). The findings must be made in writing, but this requirement "is satisfied by the district court stating its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review." *Id.* at 608 n.4.

Appellant contends that the revocation was a reflexive reaction and a serious review of the third *Austin* factor was not undertaken. "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." *Austin*, 295 N.W.2d at 251 (quotation omitted). "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed. 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." *Id.* at 250. The third *Austin* factor is satisfied if one of the following is met: "(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.

We conclude that the district court did not act in a reflexive manner because it continued the proceedings to allow an evaluation to be completed on appellant's potential candidacy for a treatment program. Following appellant's evaluation, the district court determined that appellant was not amenable to probation.

> [W]e did take a break and have an–and have a continuance in the proceeding so that [appellant] could be evaluated. I did indicate that I would have considered for [appellant] an alternative to prison if he had been willing to engage in treatment. And he was evaluated at Alpha, and as Exhibit 5 indicates, he was considered unamenable to any kind of programming.
>
> There is programming for [appellant] in the system should he choose to engage in it, but at this time it appears

> that there is not a treatment reason or a motivation for [appellant] to take advantage any more of a probationary sentence.

The district court's finding is supported by the record. After evaluating appellant, Alpha Human Services Program determined appellant was not an acceptable candidate for treatment in either the inpatient or outpatient program because: (1) appellant severely minimized his offense and his sexual behavior problems; (2) appellant appeared to have attended outpatient sexual offender treatment in the past with little discerned benefit; (3) appellant exhibited little motivation for personal change; and (4) appellant's personality and behavioral issues are long standing and chronic. The district court's finding satisfies the third *Austin* factor because appellant is unamenable to treatment and is in need of correctional treatment which can be provided most effectively if he is confined. Because the district court did not act in a reflexive manner and the finding that correctional treatment can be provided most effectively in confinement is supported by the record, the district court did not abuse its discretion in revoking appellant's probation.

Appellant also argues that the district court abused its discretion when it ranked his offense of possession of child pornography at a severity level V because the district court failed to adequately address the *Kenard* factors. "When unranked offenses are being sentenced, the [district court] shall exercise [its] discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular level was assigned." Minn. Sent. Guidelines II.A. The Minnesota Supreme Court has held that when assigning a severity level to unranked offenses, the district court may take into consideration several factors, including: "the gravity of the specific

conduct underlying the unranked offense; the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; the conduct of and severity level assigned to other offenders for the same unranked offense; and the severity level assigned to other offenders who engaged in similar conduct." *State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000).

> No single factor is controlling nor is the list of factors meant to be exhaustive. Thus, while the sentencing court has discretion in sentencing for unranked offenses, information from the Sentencing Guidelines Commission on other offenders sentenced on the same or similar offenses can help guide the exercise of that discretion.

Id. This court reviews a district court's severity level determination using an abuse of discretion standard. *State v. Bertsch*, 707 N.W.2d 660, 666 (Minn. 2006). The district court's failure to state the factors and considerations supporting its decision on the record can be a reason to find an abuse of discretion. *Id.* at 666-67.

The district court ranked the severity level at level V, but did not expressly address the *Kenard* factors and the considerations supporting its decision. The record, however, indicates that a number of the *Kenard* factors were addressed. First, the district court addressed the gravity of the specific conduct underlying the unranked offense when it discussed appellant's attitude during the presentence investigation, stating "[appellant] evidenced a very poor attitude towards the offense, towards the seriousness of the offense, towards the process, and was described as very angry and resentful about being in the position he was in, having to go through that process of evaluation, and being in

the court system in general." Furthermore, the district court expressed concern that appellant's actions "certainly suggest[] a significant risk to public safety."

Second, the district court addressed the conduct of and severity level assigned to other offenders for the same unranked offense stating "[i]t's my understanding, and probation can correct me, but from prior discussions that we had regarding the potential consequences that [appellant] was looking at in these proceedings, that the rankings statewide have been anywhere from a 3 to 5 in severity level." Importantly, the district court adequately expressed the reasons for the severity level by stating "given the nature of these violations and the extent of [appellant's] Internet wanderings and behavior, I think that a severity level 5 is an appropriate ranking for this case."

Appellant's argument is meritless because *Kenard* does not require the district court to expressly examine the factors to establish the severity level, rather the supreme court recommended that the district court take the factors into consideration because the factors can help guide the district court's discretion. *Kenard*, 606 N.W.2d at 443. Moreover, in *Bertsch*, the court stated that "[w]hen choosing a severity level, factors the district court *may consider* include: [the *Kenard* factors]." *Bertsch*, 707 N.W.2d at 666 (emphasis added). Even though it was not done expressly, the *Kenard* factors were considered. Because the factors were considered, the district court did not abuse its discretion in ranking appellant's offense at a severity level V.

Appellant also argues that the district court abused its discretion because it ignored case law analyzing the conduct of other offenders sentenced for the same crimes, and that the case law established a severity level of III or IV for similar offenses. Appellant cites

numerous cases in support of his position that 81% of cases dealing with similar offenses were ranked at severity level III or IV. But the state correctly argues that the fact remains that 19% of possessors of child pornography were sentenced at severity level V. *Kenard*, however, suggests that the severity level assigned to other offenders who engaged in similar conduct is just one factor among many to be considered. Because the range for severity level assigned to other offenders for the same unranked offense is anywhere from III to V, the district court did not abuse its discretion in ranking appellant's unranked offense at severity level V.

Affirmed.