STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1527

State of Minnesota,
Respondent,

vs.

Jarred Dean Lind,
Appellant.

Filed July 7, 2009
Affirmed
Minge, Judge

Carlton County District Court
File No. 09-CR-06-4017

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

Thomas H. Pertler, Carlton County Attorney, 202 Courthouse, P.O. Box. 300, Carlton, MN 55718 (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

MINGE, Judge

Appellant challenges the revocation of his probation, arguing that the district court (1) abused its discretion when it determined that the need for confinement outweighed the policies favoring his remaining on probation; and (2) lacked authority to recognize prison-disciplinary-confinement time in its sentencing order. We affirm.

FACTS

Appellant Jarred Dean Lind pled guilty to one count of possession of a controlled substance in the fifth degree. Appellant was sentenced to 21 months in prison. After serving part of his prison sentence, he filed a motion to withdraw his guilty plea. In response, the district court resentenced appellant to a stayed 21-month sentence, with probation for three years. The terms of probation prohibited travel outside the state. After appellant's probation officer turned down a request for approval to travel to Tennessee to visit his family, he went anyway, and a violation report was filed.

At a subsequent revocation hearing, the district court determined that appellant's Tennessee trip was a direct, intentional, and inexcusable violation of his probation. Based on this violation, appellant's criminal history, and his probation violations incident to the other convictions, the district court determined that the need for appellant's confinement outweighed the policies favoring continued probation and revoked his probation. Subsequently, the district court sentenced appellant. The sentence duration was based on information provided by appellant, the prosecution, and appellant's probation officer regarding the time he already served, the time not yet served, and 80

days of "good time," which appellant had lost due to prison-disciplinary infractions. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion when it revoked appellant's probation. Probation may be revoked if there is clear and convincing evidence that probation has been violated. Minn. R. Crim. P. 27.04, subd. 3(3). "A 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. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted). Its factual findings are subject to a clearly erroneous standard of review. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

The district court must complete a three-step analysis before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The court must make written findings that "1) designate the specific 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 policies favoring probation." *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The "written findings" requirement is met if the findings and reasons are stated "on the record, which, when reduced to a transcript, is sufficient to permit review." *Id*. at 608 n.4.

Appellant concedes that he violated his probation but argues that the evidence is insufficient to support findings that his violation was inexcusable and that the need for

confinement outweighed the policies favoring probation. Appellant misreads the second requirement. To meet that requirement, the district court may find that the violation was *either* intentional *or* inexcusable. Here, although the district court found that the violation was both, the record clearly supports the finding that his violation was intentional.[1]

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).

In revoking appellant's probation, the district court reviewed appellant's past record and the probation-violation report, and addressed the *Austin* factors. The district court determined that the evidence showed that appellant was resistant to probationary supervision, that there was "certainly a need for confinement," and that probation had "scarce resources," which are intended for "people that are willing to make use of [it]," and that appellant appeared to not take probation seriously. This supports the conclusion that the need for confinement outweighed the policies favoring probation.

Although the district court did not state explicitly that confining appellant was necessary to protect the public, the court was aware of the following information in

[1] Appellant said he wished to visit his ill mother in Tennessee. This does not address the intentional nature of the violation and thus does not affect the finding that the second factor has been met.

making its decision: (1) appellant had committed eight felonies in the past ten years; (2) he violated probation in his past three felony sentences; (3) he violated conditions of supervised release in a prior case and was sent back to prison to do the balance of his sentence; (4) his probation officer believed that appellant had exhausted all local resources for rehabilitation, including treatment programs and intensive supervision; and (5) he had continued to violate the law. Based on this record and the district court's statements at the hearing, we conclude that the district court determined that appellant's probation violation was a continuation of a pattern of not following through with or taking seriously his probationary responsibilities and that the need to confine appellant outweighed his interest in freedom. On this record, we conclude that the district court did not abuse its discretion in revoking appellant's probation.

II.

The second issue is whether the district court exceeded its authority in its sentencing order when it pronounced that, in addition to the term of imprisonment specified by the Minnesota Sentencing Guidelines, appellant was required to serve 80 additional days of disciplinary-confinement time. In sentencing, questions of law are subject to de novo review. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

When a felony offender is sentenced, the Minnesota Sentencing Guidelines specify that the district court shall "pronounce [the] sentence" and that the sentence shall be within an applicable range. Minn. Sent. Guidelines II.D. An executed sentence is served in two stages: (1) incarceration for a period equal to two-thirds of the executed sentence; and (2) supervised release for the remaining one-third of the executed sentence.

Minn. Stat. § 244.101, subd. 1 (2006). Essentially, the inmate earns one day off his imprisonment for each two days of confinement during which the inmate exhibits good behavior. Accordingly, the time converted from confinement to supervised release is called "good time." The Department of Corrections has the authority "to prescribe reasonable conditions and rules for . . . conduct, instruction, and discipline" of persons committed to the commissioner's custody. Minn. Stat. § 241.01, subd. 3a(b) (2006). Under its rules, an inmate is subject to the loss of the so-called "good time" and the extension of the term of confinement—and consequently his date of release—for institutional disciplinary infractions. Minn. Stat. § 244.05, subd. 1b (2006); Minn. R. 2940.1600 (2007).

Here, the district court executed that portion of appellant's original 21-month sentence that he had not yet served. Everyone agreed that appellant would receive credit for the time already served for the offense. The parties do not dispute that, under the sentencing guidelines, appellant's original (and reinstated) 21-month sentence required 14 months (420 days) of confinement with expectation of seven months (210 days) of good time to be served on supervised release, *assuming no penalties for disciplinary infractions*. The parties also do not dispute that appellant had been incarcerated for 392 days. The parties agree that while in prison serving this very sentence, appellant had lost 80 days of good time due to infractions he had committed. In other words, the Department of Corrections added 80 days to what would have only been a 420-day term of confinement. This extended the time to be served to a new total of 500 days, not 420

days. Subtracting the 392 days served, appellant had 108 days of confinement yet to be served.

On June 4, 2008, appellant appeared in district court for a "review of sentencing and out date," and he acknowledged that county jail personnel told him he had 108 days of incarceration remaining. The district court explained to appellant how this 108-day number was calculated, all the while acknowledging that it is the Department of Corrections that calculated his 80-day disciplinary-confinement time (loss of good time).

After reviewing the record, we conclude that the district court did not err in treating 80 days of the time appellant was incarcerated prior to his release for probation as filling the original disciplinary-confinement period that appellant was obliged to serve. The district court in effect simply ordered 108 days for the remaining sentence. There is no basis for appellant's claim that he was being required to serve more time than what he owed. The district court did not determine the good time lost or impose the forfeiture of good time. This was done by the Department of Corrections, recognized by the parties, and recognized by the district court. Appellant's claim is due to his confusion over how his sentence was calculated and over semantics.

III.

Appellant further argues that he should not have to serve any extra days of confinement resulting from disciplinary infractions that he committed during his first stint in prison on this charge. He bases his argument on the Supreme Court case of *North Carolina v. Pearce*, 395 U.S. 711, 718-22, 89 S. Ct. 2072, 2077-79 (1969), *overruled in part, Alabama v. Smith*, 490 U.S. 794, 803, 109 S. Ct. 2201, 2207 (1989). The court in

Pearce held that, if a defendant is incarcerated for a conviction that is reversed and is subsequently retried and convicted of the same or a similar offense, that defendant must be credited for the time already served when the new sentence is calculated. *Pearce*, 395 U.S. at 718-21, 89 S. Ct. at 2078. *Pearce* also states that, when a conviction has been reversed without a reconviction, the defendant's "slate has been wiped clean" and "the unexpired portion of the original sentence will never be served." *Id*. at 721, 89 S. Ct. at 2078. Appellant's reliance on *Pearce* is misplaced because his conviction was never voided or reversed, rather he was resentenced, and later his probation was revoked. Regardless, appellant has been given credit for all days he previously served.

Because we determine that the district court did not abuse its discretion when it revoked appellation probation, acted within its authority when pronouncing appellant's sentence, and properly calculated appellant's remaining sentence, we affirm.

Affirmed.

Dated: