STATE OF MINNESOTA
IN COURT OF APPEALS
A09-515

State of Minnesota,
Respondent,

vs.

Eugene Alfred Kes,
Appellant.

Filed January 26, 2010
Affirmed
Minge, Judge

Carver County District Court
File No. 10-K0-98-001243

Lori Swanson, Attorney General, St. Paul, MN; and

James W. Keeler, Carver County Attorney, Michael D. Wentzell, Assistant County Attorney, Chaska, MN (for respondent)

Richard L. Swanson, Chaska, MN (for appellant)

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

MINGE, Judge

In this probation-revocation appeal, appellant argues that the district court abused its discretion by (1) determining that his violations were intentional or inexcusable;

(2) determining that the need for confinement outweighed the policies favoring probation; and (3) executing both of his 86-month consecutive sentences. We affirm.

D E C I S I O N

I.

The basic issue is whether the district court abused its discretion by revoking appellant's probation. A district court may revoke probation if it finds upon clear and convincing evidence that probation has been violated. Minn. R. Crim. P. 27.04, subd. 3(3). Absent a clear abuse of discretion, appellate courts will not reverse a district court's determination that there is sufficient evidence to revoke probation. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980).

Before revoking probation, a district court "must (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." *Austin*, 295 N.W.2d at 250. The third *Austin* finding includes the requirement "that policy considerations may require that probation not be revoked even though the facts may allow it." *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quotations omitted). "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Austin*, 295 N.W.2d at 250. The third factor requires courts to balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* To ensure this balance is properly struck, a district court should not revoke probation and send the probationer back to prison unless the court finds that:

> (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.

Modtland, 695 N.W.2d at 607 (quotation omitted); *Austin*, 295 N.W.2d at 251 (quotation omitted).

On September 14, 1999, appellant pleaded guilty to two counts of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree. A 48-month executed sentence was imposed on the second-degree count and consecutive 86-month stayed sentences on each of the first-degree counts. One condition of the stays of execution and his probation was that he complete a sex-offender-treatment program while in prison or within five years of his release from prison.

The record shows that appellant violated this condition by not successfully completing a sex-offender-treatment program within five years of his release from prison. Appellant was first released from prison in 2002 and his probation violation was filed in 2008. The district court found that his failure to complete treatment was inexcusable because he had entered four different treatment programs since 1999 but had failed to successfully complete any of them. The district court also found that the need for confinement outweighed the policies favoring probation, noting that: (1) appellant poses a threat to public safety because he is an untreated sex offender; (2) the sex-offender treatment that appellant needs can be provided most effectively in prison; and (3) to not

revoke his probation for continually failing to complete treatment would depreciate the seriousness of his repeated violation.

Appellant argues that the district court abused its discretion by finding that the second and third *Austin* factors were satisfied. We consider those two factors.

A. Inexcuseable

Appellant's first point is that his failure to complete treatment was excusable. Appellant argues that he cooperated in treatment after his release from prison: he attended all of his sessions, he agreed to take two polygraphs, and the record does not show that he made no improvements. This is irrelevant. Attending sessions, making small improvements, taking (and failing) polygraphs were not terms of appellant's probation. He was required to complete treatment and he failed to do so. The record indicates that appellant was not a model treatment participant: he had difficulty admitting and taking responsibility for his offenses, showing empathy, demonstrating remorse, acknowledging the harm he caused others, applying feedback, participating in group therapy, and being honest. The authors of four of his discharge reports concluded that either he was not amenable to treatment, not amenable to community-based treatment, or had failed to utilize treatment to reduce his risks of reoffending. Appellant does not provide an explanation for his failure to complete any program. Under these circumstances, the district court could deem the failures cumulatively as inexcusable.

Appellant's other argument regarding excusablility is that "[t]he only basis for a violation of his probation was the subjective results of the second polygraph test." The claim is that because he willingly took the test and had no control over the results, the test

results were excusable. However, he violated probation because he failed to complete treatment, not because he failed a polygraph. Thus, the district court did not abuse its discretion by concluding that appellant's failure to complete sex-offender treatment was inexcusable.

B. Need for Confinemnent

The district court provided three reasons that support its conclusion that the need for confinement outweighs the policies favoring probation: (1) confinement of appellant is necessary for public safety; (2) treatment can be most effectively provided for appellant in prison; and (3) not revoking probation would depreciate the seriousness of appellant's probation violation. Because *Austin* uses the disjunctive in listing these bases for revocation, any one of these three reasons is sufficient on its own to find that confinement is needed. *See Austin*, 295 N.W.2d at 251.

The record supports the district court's conclusion that confinement of appellant is necessary for public safety. Reports from all of the programs in which appellant received treatment either explicitly or implicitly concluded that he poses a risk of reoffending, and a staff member at his most recent treatment center testified that "he is high risk in terms of re-offense." Thus, appellant's argument that the only evidence of a risk to reoffend is a "questionable deceptive response on a polygraph test" is without merit.

The record also supports the district court's decision that treatment can be most effectively provided for appellant in prison. Two of appellant's outpatient-treatment providers stated that he is unamenable to treatment outside of prison.[1]

The finding that not revoking appellant's probation would depreciate the seriousness of appellant's failure to complete treatment is supported by common sense: completing sex-offender treatment is an important part of the rehabilitation of a sex offender. It is also supported by the testimony of appellant's therapist in his most recent treatment program that completing treatment is an important element of lessening the risk of reoffense. Appellant does not appear to make any argument that specifically addresses this finding by the district court.

Appellant attempts to portray his discharge summary from his second incomplete treatment in prison as showing that he no longer needed treatment. The summary notes that he will be leaving on the expiration date of his 48-month sentence and that he is not *required* to attend further treatment. This discharge summary does not indicate that he does not need treatment. The notation may reflect despair in dealing with appellant. Certainly, it did not change the terms of the district court's sentence. Appellant himself acknowledged his obligation to successfully complete treatment in his probation agreement, which he signed after this discharge summary was written.

Appellant's remaining arguments on the need-for-confinement *Austin* factor are similarly unavailing. Contrary to appellant's assertion, there is ample evidence in the

[1] The third outpatient treatment provider concluded that he is unamenable to treatment in any setting.

record to support the conclusion that appellant's treatment had failed. All three of appellant's outpatient-treatment providers concluded either that he is unamenable to treatment in any setting or that he is unamenable to treatment outside of prison. These facts also undercut appellant's argument that the state cannot show the unavailability of treatment. If outpatient treatment is ineffective, it is irrelevant whether it is available. Appellant's argument that some of his treatment was duplicative is also irrelevant: failed duplicative treatment does not lessen the need for confinement. Similarly, his argument that he participated in treatment is also irrelevant because participation does not constitute completion of a program. Moreover, his treatment providers almost uniformly characterized his participation as minimal, and with one exception, terminated him from their program.

In sum, the district court did not abuse its discretion by determining that the need for confinement outweighed the policies favoring probation. Because the district court did not abuse its discretion by finding all three *Austin* factors met, we affirm its revocation of appellant's probation.

II.

The second issue is whether the district court abused its discretion by executing both of appellant's stayed consecutive 86-month sentences. "The district court enjoys discretion in sentencing and will be reversed only for an abuse of that discretion." *State v. Daniels*, 765 N.W.2d 645, 651 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). "When the district court has discretion to impose consecutive sentences, we will uphold the sentences unless they are disproportionate to the offense or unfairly

exaggerate[] the criminality of the defendant's conduct." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007) (alteration in original) (quotation omitted), *review denied* (Minn. Feb. 19, 2008).

The district court revoked appellant's probation and executed his two 86-month consecutive sentences because he "intentionally and inexcusably violated the terms of his probation by not successfully completing sex offender treatment." Appellant argues that the district court abused its discretion by revoking the stay of both of his 86-month sentences because the prosecution requested that appellant serve only one 86-month sentence and that the probation agent requested that he be released from prison after successfully completing a treatment program. The record does not provide support for the claim that the probation agent requested a shorter sentence. Rather, on direct examination, the agent recommended that the district court execute appellant's sentence and on cross-examination she added that he be released from prison at an undefined time after he completed a treatment program. Regardless, the district court has discretion in sentencing; it does not have to accept the prosecution's recommendation.

During the original sentencing following appellant's plea agreement, the district court informed him that if he violated his probation it could execute both of his 86-month consecutive sentences. Appellant violated his probation by failing to complete a treatment program, despite having more than nine years to do so and attempting four separate programs.

Appellant's offenses are significant. He pleaded guilty to two counts of criminal sexual conduct in the first degree. Each count involved repeated serious sexual abuse of

one of his daughters over a period of nine and a half years when the two girls were less than 13 years old. This court has upheld the imposition of consecutive sentences. *See Suhon*, 742 N.W.2d at 24-25 (finding no abuse of discretion when the district court sentenced the defendant consecutively for first-degree criminal sexual conduct committed against his daughter over a ten-year period). We conclude that the district court did not abuse its discretion by revoking the stay of both of appellant's 86-month sentences.[2]

Affirmed.

Dated:

[2] At oral argument this court was advised that a sentencing misunderstanding occurred during appellant's original sentencing following his plea agreement. The assistant county attorney indicated that his office would be moving for a correction in appellant's sentence. This issue was not before us and our decision does not preclude the district court from taking action to modify appellant's sentence to correspond to his plea agreement.