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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-931**

State of Minnesota,
Respondent,

vs.

James Allen Bergstrom,
Appellant.

**Filed January 12, 2010
Affirmed
Larkin, Judge**

Washington County District Court
File No. 82CG-CR-08-2906

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and

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant claims that the district court abused its discretion by revoking his probation. Because the district court properly exercised its discretion, we affirm.

FACTS

On June 16, 2008, appellant James Allen Bergstrom pleaded guilty to one count of felony violation of an order for protection under Minn. Stat. § 518B.01, subd. 14(d)(1) (2006). Bergstrom was sentenced to a stayed prison term of 18 months and placed on supervised probation for five years. At his sentencing hearing, the district court informed Bergstrom that he must comply with a global-positioning-system (GPS) monitoring program, have no contact with the victim of the offense, and have no “same or similar offenses.”

On January 27, 2009, Bergstrom’s case was assigned to probation officer Holly Busby. Busby placed Bergstrom on GPS monitoring.¹ Busby told Bergstrom that she would need to approve his GPS monitoring schedule and that any changes to his schedule must go directly through her. The GPS monitoring schedule required Bergstrom to place the GPS unit in a docking station at his home every night from 11:00 p.m. until 5:00 a.m.

On February 4, two days after GPS monitoring began, Bergstrom contacted the probation office to request a change in the docking schedule, claiming that he had to work later than anticipated that evening. Busby was not in the office that day, and

¹ Despite the district court’s order that Bergstrom comply with GPS monitoring as a condition of probation, the probation officer who was previously assigned to supervise Bergstrom did not initiate GPS monitoring.

Bergstrom spoke with another agent. That agent informed Bergstrom that any change in his schedule must be approved by Busby. Undeterred, Bergstrom called the probation office a second time and spoke with a different probation officer. Bergstrom was able to convince this officer to change his schedule such that he would not need to dock the GPS unit until 2:00 a.m.

The next day, Busby contacted Bergstrom to address the violation, but Bergstrom denied that he had behaved inappropriately. Busby contacted Bergstrom's place of employment and learned that he left work the night before between 11:00 and 11:30 p.m. She then contacted the GPS monitoring center to establish Bergstrom's whereabouts for the preceding 24 hours. A GPS monitoring printout indicated that Bergstrom went to the home of his ex-girlfriend, B.J.J., after he left work.

On February 9, Busby requested printouts pinpointing Bergstrom's locations since February 3. These printouts concerned Busby because they showed that Bergstrom was going to B.J.J.'s home multiple times a day. The printouts also indicated that Bergstrom would sometimes park his vehicle away from B.J.J.'s apartment complex, walk across a grassy area to enter her complex, and then move around to different areas within the complex. Busby contacted B.J.J., and B.J.J. informed Busby that she was not in a relationship with Bergstrom and that she had tried to break off contact with Bergstrom on numerous occasions. B.J.J. said that she had told Bergstrom that she no longer wanted a relationship with him, however, "[Bergstrom] wouldn't take no for an answer." B.J.J. also told Busby that Bergstrom would leave items outside her door and that on more than

one occasion, she heard somebody trying to get into her home, looked out the window, and saw Bergstrom running away.

Busby addressed this behavior with Bergstrom, who stated that he was completely unaware that he was not welcome at B.J.J.'s apartment. Busby informed Bergstrom that a one-mile radius around B.J.J.'s address would be established as an exclusionary zone and that he was not to have any contact with B.J.J. However, Bergstrom was allowed to enter the exclusionary zone once per day to go to his health club and the post office.

Busby met with B.J.J. again on February 10. B.J.J. informed Busby that she was concerned about the safety of Bergstrom's ex-wife based on conversations that she had had with Bergstrom. That evening, the GPS monitoring service called Busby to notify her that Bergstrom had entered the exclusionary zone. It did not appear that Bergstrom had gone near B.J.J.'s apartment, so Busby was not concerned by this report. But the monitoring service called again 20 minutes later to notify Busby that Bergstrom had called and insisted that he needed to return to the post office, claiming that it was an urgent matter and that he needed to enter the exclusionary zone. This phone call occurred at approximately 9:30 p.m. Busby refused to approve Bergstrom's request to enter the exclusionary zone.

Based on all of the circumstances, an apprehension and detention order issued for Bergstrom, and he was arrested. Upon searching his apartment, Busby found an abnormal amount of information about B.J.J.'s daughter.

The district court held a probation violation hearing on February 25. Both Busby and B.J.J. testified at the hearing. At the end of the hearing, the district court concluded

that Bergstrom had knowingly and intentionally violated the terms of his probation by engaging in “same or similar behavior as that for which he was convicted” and by “[violating] the GPS monitoring rules.”² The district court further found that the need for confinement outweighed the policies favoring probation and revoked Bergstrom’s stayed prison sentence. This appeal follows.

DECISION

“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). However, “before probation [can] be revoked, the 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 need for confinement outweighs the policies favoring probation.” *Id.* at 250. Whether the district court made the findings required for revocation of probation is a question of law, which this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

GPS Monitoring

Bergstrom argues that he did not violate the GPS monitoring program and therefore did not violate probation. He first asserts that contacting the probation office to alter the time at which he needed to dock his GPS unit did not violate the GPS

² The district court also noted that Bergstrom violated probation by not continuing to live with a pastor and his wife, which had also been ordered as a condition of probation, and by failing to report police contact that he had on January 26 or 27, when he was stopped for a traffic offense and lied to police officers about his true residence.

monitoring program itself, but instead violated his agent's instructions with regard to the program. This distinction is inconsequential.

We note that at Bergstrom's sentencing hearing, the probation department recommended that Bergstrom receive an executed prison sentence pursuant to an upward dispositional departure. But because the plea negotiation called for a guidelines sentence, the district court agreed to a probationary sentence. However, the district court expressed concerns about the probationary disposition and warned Bergstrom that his "leash [was] very short."

The district court ordered that one condition of probation was compliance with a GPS monitoring program. In addition, the district court ordered Bergstrom to "follow all the rules of probation," which would necessarily include rules related to the GPS monitoring program. In that regard, probation officer Busby informed Bergstrom that she must approve any schedule change to Bergstrom's GPS monitoring program. Two days after GPS monitoring began, Bergstrom asked another officer to change his schedule. This officer refused, stating that Busby needed to approve any schedule changes. Bergstrom ignored this instruction and persisted until he reached a probation officer who was willing to alter the schedule, in direct contravention of the probationary rule.

Bergstrom had been explicitly informed by Busby, and a second probation officer, that Busby must approve any schedule changes. Bergstrom chose not to comply with this directive and instead persuaded a third probation officer to change his schedule. This is clear and convincing evidence of noncompliance with a probationary rule that is directly related to the GPS monitoring program. Bergstrom's argument that there is a meaningful

distinction between failing to follow the probationary rules that govern his GPS monitoring program and failing to comply with the program itself is unpersuasive.

Bergstrom next argues that the district court erroneously concluded that he violated the GPS monitoring program by being untruthful with the probation officer who ultimately changed his schedule. The district court concluded that Bergstrom lied about needing to work late. “The [district] court’s 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). Bergstrom stated that he needed to change his schedule so he would not need to dock his GPS unit until 2:00 a.m., because he had to work late. Bergstrom’s employer stated that he left work between 11:00 p.m. and 11:30 p.m. It does appear, as Bergstrom contends, that he worked later than usual. However, Bergstrom did not work nearly as late as he had implied he would. Therefore, the district court’s finding that Bergstrom was not entirely truthful with the probation officer is not clearly erroneous.

Lastly, Bergstrom argues that he did not violate the GPS monitoring program by attempting to reenter the exclusionary zone. Busby explicitly told Bergstrom that he was only allowed into the exclusionary zone once per day. Any attempt to reenter the zone was, at a minimum, an attempt to manipulate the probationary rule regarding the GPS monitoring program. Moreover, Busby’s attempt to gain permission by contacting the monitoring service directly, instead of Busby, was in direct contravention of Busby’s rule that any schedule change must be approved by her.

The district court concluded:

Taken together and taken in the context of the offenses for which [] Bergstrom was convicted and in the context of the importance of strict compliance with the GPS monitoring rules, the court finds that the state has demonstrated by clear and convincing evidence that [] Bergstrom has knowingly and intentionally violated the GPS monitoring rules.

We agree.

Same or Similar Offense

Bergstrom argues that although he engaged in behavior that was similar to his underlying conviction, there is no evidence that he had actually committed a new offense. Bergstrom agrees that a probation violation may be pursued on the grounds that the probationer committed a new criminal offense without the need for a formal conviction or charge for the conduct, as we recognized in *State v. Phabsomphou*, 530 N.W.2d 876, 878 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). But Bergstrom argues that his similar “behavior” does not violate the condition that was actually imposed: that he not commit “same or similar offenses.”

Bergstrom relies on *State v. Ornelas*, 675 N.W.2d 74 (Minn. 2004), but his reliance is misplaced. In *Ornelas*, a defendant’s probation was revoked for having contact with an individual under the age of 18 even though the district court had not ordered him to refrain from such contact as a condition of probation. *Id.* at 76. The supreme court held that a district court may not revoke probation based on a violation of a condition of probation unless the condition was actually imposed by the district court. *Id.* at 78-80. Here, there is no dispute that Bergstrom was ordered to have “no same or

similar offenses.” The issue is whether there is clear and convincing evidence that Bergstrom violated this condition.

While the district court did not specifically find that Bergstrom’s conduct toward B.J.J. constituted a criminal offense, the district court’s explanation for its findings indicates that the district court concluded that Bergstrom committed the offense of harassment. “[H]arass means to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim.” Minn. Stat. § 609.749, subd. 1 (2008). A person who harasses another by stalking, following, monitoring, or pursuing, whether in person or through technological or other means, is guilty of a gross misdemeanor. *Id.* subd. 2(a)(2) (2008). The district court specifically referenced “the act of stalking” when describing Bergstrom’s conduct toward B.J.J., and there is clear and convincing evidence indicating that Bergstrom’s conduct constituted harassment by stalking.

The district court found that Bergstrom “engaged in obsessive and repetitive prying into the personal and private lives of others.” The district court noted that in the underlying offenses,³ Bergstrom followed his ex-wife to a friend’s house after an order for protection had been issued and laid in wait for her in the parking lot of a nearby church. Bergstrom also accessed his ex-wife’s email account 18 times within two days without her permission. The district court compared that behavior to Bergstrom’s

³ Bergstrom was on probation for two separate convictions of violation of an order for protection. In the probation-revocation proceeding, the district court revoked probation in both cases. However, Bergstrom appeals the decision in only one of the cases.

behavior toward B.J.J. and her daughter: he engaged in nightly visits to B.J.J.'s apartment complex; he possessed an abnormal amount of information about B.J.J.'s daughter, including not only information that was available to the public on her Facebook page but also a video depicting her and her friends in what was obviously private behavior and not intended for Bergstrom's enjoyment; he contacted or visited B.J.J. at her place of employment at least two times after she told him that she did not want contact with him anymore; and he tracked B.J.J. and her daughter by monitoring cell phones that he had given them. The district court noted that this behavior was unwanted, as evidenced by B.J.J.'s application for a harassment restraining order. And B.J.J. told Bergstrom on numerous occasions that she did not want to see him anymore. Nonetheless, he continued to visit her home uninvited, often parking away from her complex and approaching her apartment on foot. This behavior demonstrates that Bergstrom had reason to know that his appearance at B.J.J.'s home was unwelcome and would cause her to feel "frightened, threatened, oppressed, persecuted, or intimidated." *See* Minn. Stat. § 609.749, subd. 1 (describing elements of offense of harassment). Moreover, B.J.J. testified that she was "very scared" when Bergstrom attempted to enter her apartment uninvited.

Thus, a comparison of the conduct underlying Bergstrom's conviction offenses and Bergstrom's conduct toward B.J.J. demonstrates that Bergstrom committed a same or similar offense. *Cf. State v. Smallwood*, 594 N.W.2d 144, 156-57 (Minn. 1999) (concluding that when determining whether an out-of-state conviction is the same or similar to a Minnesota offense, the court may look beyond the elements of the out-of-

state offense to the conduct underlying that offense). Regardless of the fact that the district court referenced Bergstrom's "behavior" instead of an "offense," the district court recognized that (1) Bergstrom engaged in stalking behavior, which constituted the offense of harassment under the circumstances, (2) this offense was similar to his conviction offenses, and (3) commission of the offense violated a condition of probation. The district court's finding in this regard is not erroneous.

Need for Confinement

Bergstrom argues that even if we conclude that the district court did not abuse its discretion by finding that he violated conditions of probation, the district court nevertheless abused its discretion by concluding that the need for confinement outweighs the policies favoring continued probation. When determining whether the need for confinement outweighs the policies favoring probation, a district court should consider whether:

- (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.

Austin, 295 N.W.2d at 251.

The district court found that confinement was necessary to protect public safety. At the sentencing hearing, the district court noted that Bergstrom, by his own admission, had engaged in violent conduct against his ex-wife and others. Furthermore, the district court also noted that Bergstrom's psychological evaluation described him as being very

controlling and very manipulative. The district court correctly found that Bergstrom continued to engage in the type of controlling and manipulative behavior that concerned the district court at the sentencing hearing. Bergstrom used controlling and manipulative behavior to subvert probationary rules regarding his GPS monitoring program and to maintain contact with B.J.J. and her daughter despite B.J.J.'s wishes to the contrary. Based on the evidence in the record, the district court's finding that confinement was necessary to protect public safety was not clearly erroneous, and the district court did not abuse its discretion by revoking Bergstrom's probation.

Affirmed.

Dated:

Judge Michelle A. Larkin