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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1308**

State of Minnesota,
Respondent,

vs.

Dustin John Hamers,
Appellant.

**Filed June 1, 2010
Affirmed
Bjorkman, Judge
Concurring specially, Randall, Judge***

Benton County District Court
File No. 05-K9-03-71

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

Robert Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

On appeal from an order imposing sanctions based on probation violations, appellant argues that (1) there is insufficient evidence that he violated his probation, (2) he did not receive adequate notice of the circumstances of the violations, and (3) sanctions are inappropriate because the alleged violations were excusable. Because the district court did not abuse its discretion in determining that appellant violated his probation terms or by imposing sanctions, we affirm.

FACTS

In 2003, appellant Dustin Hamers was charged with one count of third-degree criminal sexual conduct related to sexual intercourse between then-22-year-old Hamers and a 15-year-old. Upon Hamers' plea, the district court stayed adjudication and placed Hamers on probation for 15 years. Probation conditions included, among other things, regular reporting to a probation officer and completion of a sex-offender treatment program at CORE professional services in St. Cloud. Treatment at CORE consists of two phases—a primary phase involving weekly treatment sessions, and a secondary “aftercare” phase involving less frequent sessions and two polygraph exams. Hamers completed the first treatment phase and most of the second phase.

Hamers faced no alleged probation violations until 2008. In October of that year, a former girlfriend, J.S., told the Stearns County Sheriff's Office that Hamers forced her to perform oral sex on him. Stearns County did not prosecute the alleged sexual assault but reported the allegations to Hamers' probation officer.

During his last polygraph exam at CORE, Hamers claimed that his sexual encounter with J.S. was consensual. When confronted with the fact that the exam revealed significant indicia of deception, Hamers admitted that J.S. “may” have felt pressure to perform oral sex or risk his termination of their relationship. CORE consequently terminated Hamers from treatment, indicating that he “appears to be in his sexual abuse cycle at the present time” and was not using his treatment tools. CORE stated that it would “consider” allowing Hamers to return to the primary treatment phase following a “correctional consequence.”

In December 2008, Hamers’ probation officer filed a violation report, seeking revocation on the grounds that Hamers (1) failed to complete the CORE treatment program and (2) was not truthful with her because he failed to disclose his relationship with J.S. Pending resolution of the violation, the probation officer told Hamers not to enter a new treatment program. But in the spring of 2009, Hamers enrolled in a new program at Primary Behavioral Health Clinics (PBHC) in Minneapolis. The probation officer then visited Hamers’ home in March and found posters picturing “scantily-clad” women. The probation officer amended the violation report to include these incidents.

The district court conducted a probation-revocation hearing, finding that there was clear and convincing evidence that Hamers violated probation by “being unsuccessfully discharged” from CORE. The court also found that Hamers failed to cooperate with his probation officer because he enrolled in a new treatment program against his officer’s orders and that the posters in Hamers’ home demonstrated an “unhealthy and deviant” character. Based on these violations, the district court revoked the stay of adjudication,

sentenced Hamers to 18 months, stayed execution of that sentence, reinstated probation for 15 years, and ordered Hamers to serve 60 days in prison. This appeal follows.

DECISION

The procedures for addressing alleged probation violations are set forth in Minn. R. Crim. P. 27.04. Upon a reported violation, a probationer must be informed of which condition he is accused of violating. Minn. R. Crim. P. 27.04, subd. 1(2)(b); *State v. Cottew*, 746 N.W.2d 632, 635 (Minn. 2008). The probationer is also entitled to a hearing at which the district court must find violations by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 3(2). Upon this finding, the district court has discretion to revoke probation or impose intermediate sanctions. Minn. R. Crim. P. 27.04, subd. 3(2)(b). Although the court need not analyze the *Austin* factors¹ when it does not revoke probation, it must follow other procedural safeguards in rule 27.04. *Cottew*, 746 N.W.2d at 637-38. We review a district court's determination that a violation has occurred and its choice of sanction for abuse of discretion. *Id.* at 638; *State v. Johnson*, 679 N.W.2d 169, 176 (Minn. App. 2004).

I. The district court did not abuse its discretion in finding clear and convincing evidence that Hamers violated his probation conditions.

Hamers asserts that the state did not produce clear and convincing evidence that he violated his probation terms. In light of this standard, we review each alleged violation in turn.

¹ *State v. Austin* requires district courts revoking probation to make written findings that (1) designate the specific condition that was violated, (2) determine the violation was intentional or inexcusable, and (3) conclude the need for confinement outweighs the policies favoring probation. 295 N.W.2d 246, 250 (Minn. 1980).

With respect to the first alleged violation, it is undisputed that CORE expelled Hamers from the aftercare program. Because successful completion of the program was a probation condition, Hamers' expulsion was a clear violation. And we are not persuaded by Hamers' argument that because his probation term had not expired and there was no express deadline for completing treatment, he was not in violation. This is not a situation where a probationer was temporarily expelled from treatment for financial reasons or other circumstances beyond his control. Rather, Hamers' expulsion from CORE was caused by his own actions. As the district court noted, "clearly there is a very significant reason for his failure at the CORE program and his unsuccessful discharge." Moreover, CORE indicated that it would only "consider" readmitting Hamers to the program following a "correctional consequence," and that he would have to return to the primary phase of treatment. The evidence does not necessarily establish that CORE was ready to readmit Hamers or that he could complete the program within the remainder of his probation term. On this record, the district court did not abuse its discretion in determining that Hamers violated his probation terms.

We also conclude that there was evidentiary support for the district court's finding that Hamers failed to cooperate and be truthful with his probation officer. Hamers admits that he enrolled in the PBHC treatment program against his probation officer's directive. The district court further noted that the probation officer would have difficulty participating in sessions at PBHC, and this fact is supported by the officer's testimony. Accordingly, we conclude that the district court did not abuse its discretion in finding Hamers in violation of his probation requirements.

II. Hamers had adequate notice of the circumstances of the alleged violations prior to the probation-revocation hearing.

Hamers also contends that he was not given proper notice of the circumstances surrounding the alleged violations in contravention of rule 27.04 and his due-process rights. Rule 27.04, subd. 1(2)(d), provides that a violation report must include “a factual statement supporting probable cause to believe the probationer violated the terms of probation.” This rule establishes that “the defendant is entitled to receive a copy of the written violation report describing the circumstances of the violation and must be told which probation condition [he] is accused of violating.” *Cottew*, 746 N.W.2d at 638. Whether the state provided adequate notice of the violation is a question of law, which we review de novo. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005).

Hamers challenges the adequacy of the notice as to the second violation ground—failure to cooperate with his probation officer. His argument turns on the fact that the violation reports identified his claimed violation as his failure to apprise his probation officer of his relationship with J.S., but the district court found that his unpermitted enrollment at PBHC constituted the violation.

While it is true that the initial probation violation report did not describe Hamers’ unpermitted enrollment at PBHC, that is because that event had not yet occurred. The probation officer submitted an addendum to the report before the hearing, however, indicating that (a) Hamers was starting a new treatment program against her direction, (b) she warned against the enrollment, and (c) Hamers ignored the warning. Although this description appears in the “adjustment” rather than the “violations” section of the

addendum, it clearly notified Hamers of the factual basis for the claimed violation. Hamers does not provide any caselaw or argument that explains why circumstances supporting a violation must be listed in the “violations” section of the report. The rule only requires that the report itself describe violations and the attendant circumstances. Minn. R. Crim. P. 27.04, subd. 1(1). We conclude that Hamers had adequate notice of the violation’s circumstances.

III. The district court did not abuse its discretion by concluding that Hamers’ violations were not excusable and imposing intermediate sanctions.

Hamers argues that sanctions were improper because his violations, if proven, were unintentional and excusable. He essentially claims that his overall conduct while on probation has been positive, his admission concerning his sexual conduct with J.S. does not demonstrate culpability, and his expulsion from CORE was therefore excusable. We first observe that a district court is not required to find inexcusable conduct when the court is not revoking probation. *Cottew*, 746 N.W.2d at 638. But we agree that imposition of jail time and revocation of a stay of adjudication with respect to an entirely blameless defendant could be arbitrary so as to constitute an abuse of discretion. *Id.* (stating that the exercise of discretion in determining intermediate sanctions “requires conscientious judgment, not arbitrary action”).

The record shows that his expulsion from CORE was not blameless. Hamers’ therapist explained that his expulsion resulted from his general “lack of progress,” coupled with his poor performance on the polygraph exam, and his admission that he

pressured J.S. to have oral sex. We further note that the lewd pictures found in Hamers' home can reasonably show unhealthy behavior for someone in sex-offender treatment.²

Even if Hamers' failure to complete sex-offender treatment was excusable, the district court found a separate violation based on Hamers' failure to cooperate with his probation officer. We are not persuaded by Hamers' argument that he should be rewarded and not punished for enrolling in a new program on his own volition. The record demonstrates that his enrollment was against his probation officer's directive and that it would be difficult for the probation officer to participate in treatment sessions at PBHC. On this record, the district court did not abuse its discretion in imposing intermediate sanctions of extended probation, incarceration, and revocation of the stay of adjudication.

Affirmed.

² Because the district court's findings with respect to the posters found in Hamers' home were not a primary or independent basis for its ruling, we do not address whether it would be an abuse of discretion to impose sanctions based solely on possession of nonpornographic images.

RANDALL, Judge (concurring specially)

I concur in the result. The constitutional issues regarding deficiencies, and what we do to men and women in Hamers' category, have been addressed at length, by me and "a cast of hundreds" if you examine appellate opinions, state and federal, and law review articles. Thus, I simply refer to the previous position I have taken on this issue. *See Joelson v. O'Keefe*, 594 N.W.2d 905, 913-18 (Minn. App. 1999) (Randall, J., concurring), *review denied* (Minn. July 28, 1999); *In re Linehan*, 544 N.W.2d 308, 319-26 (Minn. App. 1996) (Randall, J., dissenting), *aff'd*, 557 N.W.2d 171 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd*, 594 N.W.2d 867 (Minn. 1999); *In re Mattson*, No. C5-95-452, 1995 WL 365374, at *4-6 (Minn. App. 1995) (Randall, J., concurring specially), *review denied* (Minn. Aug. 30, 1995).