STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1910

State of Minnesota,
Respondent,

vs.

James Wesley Wilkes,
Appellant.

Filed June 22, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR0822718

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, 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

STONEBURNER, Judge

Appellant challenges revocation of his probation, arguing that the evidence did not establish that his probation violation was intentional or inexcusable and that the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

In July 2008, appellant James Wesley Wilkes was convicted of first-degree aggravated robbery based on his admission that he, Erick Felton, and another accomplice grabbed a victim off the street at random, beat the victim, and robbed him of several hundred dollars. The district court stayed the imposition of sentence—a downward dispositional departure from the presumptive guidelines sentence of commitment to the Department of Corrections for 48 months—and placed Wilkes on five years of probation with conditions, including a prohibition on contact with Erick Felton and the other accomplice involved in the robbery.

In December 2008, after a conviction of fifth-degree assault, Wilkes admitted to violating probation by failing to remain law abiding. Wilkes was ordered to serve ten days of community service, and probation was reinstated.

Approximately two months later, Wilkes was arrested and charged with aiding and abetting simple robbery. Erick Felton was convicted of this robbery. A probation-violation hearing based on this robbery took place on the morning of the day that trial was scheduled to begin on the robbery charge. Because Wilkes had not been convicted of the robbery charge, the district court declined to hear violation claims based on that

charge, but permitted the state to proceed based on Wilkes's violation of the no-contact order.[1] Minneapolis Police Officer Ryan Johnson testified that, while investigating the robbery, he discovered Wilkes and Erick Felton in a home near the scene of the robbery.

Wilkes did not deny contact with Erick Felton on the night of the robbery, but characterized it as "minor" and "not knowing." After finding that Wilkes intentionally violated the no-contact provision of his probation, the district court revoked the stay of imposition, and Wilkes was sentenced to 41 months, executed. In this appeal, Wilkes challenges the revocation of his probation.

D E C I S I O N

A district court may revoke probation if it finds clear and convincing evidence that any probation conditions have been violated. Minn. R. Crim. P. 27.04, subd. 3(3). Clear and convincing evidence is demonstrated when the truth of the facts sought to be admitted is "highly probable." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). If the imposition of the sentence was previously stayed, the district court may revoke the stay, impose the sentence, and order that it be executed. Minn. Stat. § 609.14, subd. 3 (2008). "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). Findings of fact are accorded great weight and will not be set aside unless clearly erroneous. *See State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

[1] The record reflects that the outcome of the probation revocation hearing had implications for the plea negotiations in the robbery matter that was to be tried that day.

"When determining if revocation is appropriate, courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *State v. Modtland*, 695 N.W.2d 602, 606–07 (Minn. 2005) (quotations omitted). "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 (quotations omitted).

Before revoking probation, the 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." *Id.* at 250. The district court must make these findings on the record and "should not assume that [it] ha[s] satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation." *Modtland*, 695 N.W.2d at 608.

Wilkes does not dispute that the conditions of his probation preclude contact with Felton, but Wilkes asserts that the evidence that he and Felton were discovered in Wilkes's girlfriend's house by Officer Johnson demonstrates that their contact was only minor and unintentional. Wilkes argues on appeal that Erick Felton "just showed up" at Wilkes's girlfriend's home, without Wilkes knowing. But Wilkes did not testify to that at the probation revocation hearing, and there is no evidence in the record to support Wilkes's assertion.

The district court found that Erick Felton and Wilkes were discovered in the house near the scene of the robbery during early morning hours and that there is no evidence that either man was invited into the home or had any legitimate reason for being there. The district court also found that "the only reasonable inference is that [Wilkes's contact with Felton] was intentional or inexcusable contact." We conclude that clear and convincing evidence in the record supports the district court's findings.

Wilkes also argues that the third *Austin* factor was not satisfied because "there was not sufficient evidence in the record to prove by clear and convincing evidence that . . . the need for confinement outweighed the policies supporting probation in this case." "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 district court is required 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).

The district court found that Wilkes is in need of confinement to protect the public from further criminal activity. The district court also found that Wilkes had failed to successfully serve out his probationary period by committing not one, but two, violations of his probation—including committing another offense (i.e., fifth-degree assault)—within a very short period of time. The evidence in the record supports this finding and does not support Wilkes's argument that he was making progress toward rehabilitation and taking probation seriously.

Wilkes characterizes the district court's decision to revoke his probation as the type prohibited by *Austin*: a "reflexive reaction to an accumulation of technical violations." 295 N.W.2d at 251. But violation of the no-contact provision is not a mere technical violation. Erick Felton was involved in the commission of the crime that resulted in Wilkes's probation and had just engaged in serious criminal activity at the time he was found with Wilkes. The transcript of the revocation hearing reflects that the district court did not make a "reflexive" decision, but rather that it considered all of the circumstances of Wilkes's no-contact violation, and the fact that Wilkes had already been given a second chance at probation. The record supports the district court's conclusion that Wilkes's probation should be revoked.

Affirmed.