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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1717**

State of Minnesota,
Respondent,

vs.

Jon Erwin Meierding, Jr.,
Appellant.

**Filed July 13, 2010
Affirmed
Johnson, Judge**

Crow Wing County District Court
File No. 18-CR-08-6861

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

Don Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney,
Brainerd, Minnesota (for respondent)

Josh DuBois, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Jon Erwin Meierding, Jr., is on probation because he was convicted of driving while
impaired. He twice has failed to comply with a condition of his probation that requires him

to submit to random drug and alcohol testing. The state sought to revoke his probation. The district court found that he violated a condition of his probation but did not revoke his probation. Instead, the district court imposed an intermediate sanction of 21 days in jail. Meierding appeals, arguing that the imposition of the intermediate sanction violated his right to due process. We affirm.

FACTS

In February 2009, Meierding pleaded guilty to fourth-degree driving while impaired (DWI). That same day, the district court sentenced him to 90 days in jail but stayed imposition of the sentence for two years and placed him on supervised probation. As a special condition of his probation, the district court ordered him to “undergo a Rule 25 chemical dependency evaluation and follow[] any recommendations made.”

In April 2009, Meierding submitted to a chemical-dependency evaluation. On June 10, 2009, he met with his probation officer, Tracey Anderson, to review and sign a written probation agreement, which stated the standard conditions and the special conditions of his probation. Because Anderson had not yet received the results of the chemical-dependency evaluation, she could not incorporate the evaluator’s assessment into the probation agreement. Nonetheless, the probation agreement stated that Meierding must “[c]omplete” and “comply with [an] alcohol assessment.”

Anderson received the assessment on June 15, 2009. That same day, she mailed a copy of the assessment to Meierding. The assessment states that Meierding must abstain from the use of alcohol and other intoxicants and must “participate in random testing to substantiate compliance” with the abstinence requirement. In an accompanying letter,

Anderson reiterated some of the recommendations of the assessment but not the requirement that Meierding submit to random testing. On the same day, Anderson made a handwritten note on Meierding's probation agreement that, based on the assessment, Meierding must not use alcohol, must not go to bars, and must submit to random testing. Anderson did not, however, send a copy of the annotated probation agreement to Meierding.

Random testing in Crow Wing County is administered by a private company, Mid-Minnesota Drug Testing (MMDT). In July, MMDT sent Meierding a letter explaining its random testing procedures. MMDT's letter referred to Meierding's sentence and instructed him to call a telephone number every day to hear a recorded message that would inform him whether he was required to report for testing that day. Based on MMDT's random methods, Meierding was required to report for testing on July 30, 2009, and on August 20, 2009, but he did not appear on either date. Consequently, Anderson filed a notice of a probation violation.

In September 2009, the district court held a hearing on the alleged probation violation. At the hearing, Meierding challenged both the imposition of the condition that he submit to random testing and the notification of the condition. The state called Anderson as its sole witness. Meierding did not testify. At the conclusion of the hearing, the district court found that the condition was validly imposed, that Meierding knew of the condition, and that he violated it. But the district court did not revoke Meierding's probation. Rather, the district court reinstated Meierding on probation with the same terms and conditions that previously had been imposed, including "no use of any alcohol or any intoxicants." The district court also ordered Meierding to serve 21 days in jail as an intermediate sanction.

The district court reasoned that Meierding is “amenable to probation” and that there are “mitigating circumstances” relating to the issue whether he received proper notice of the random testing procedures. Meierding appeals.

D E C I S I O N

Meierding argues that the district court erred because he did not have proper notice of the random testing procedures such that the district court’s imposition of an intermediate sanction violates his right to due process. We apply an abuse-of-discretion standard of review to a district court’s imposition of an intermediate sanction for a probation violation. *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008).

If the state alleges that a probationer has violated a condition of probation, the probationer is “entitled to receive a copy of the written violation report describing the circumstances of the violation and must be told which probation condition she is accused of violating.” *Id.* (citing Minn. R. Crim. P. 27.04, subds. 1-2). In addition, the probationer is entitled to a hearing. *Id.*; Minn. R. Crim. P. 27.04, subd. 3 (2009). At the hearing, the district court may, “upon clear and convincing evidence that any conditions of probation have been violated,” place the probationer on probation again and stay imposition of sentence or impose the stayed sentence, or the district court may revoke probation. Minn. R. Crim. P. 27.04, subd. 3(3) (2009). If the district court imposes a stayed sentence following a probation violation, it also may impose an intermediate sanction. Minn. Stat. § 609.14, subd. 3 (2008).

Meierding contends that the intermediate sanction in this case was imposed in violation of the Due Process Clause because he did not receive “fair warning” of the

conduct that might cause him to be incarcerated. “In imposing a probationary sentence, ‘if noncriminal conduct could result in revocation, the trial court should advise the defendant so that the defendant can be reasonably able to tell what lawful acts are prohibited.’” *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004) (quoting Minn. R. Crim. P. 27.03, subd. 4(E)(2)).

It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation. When the acts prohibited by the probation conditions are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning.

Id. (quotations and citations omitted). A probation condition is not improper merely because a district court delegates its implementation to a chemical-dependency evaluator for a determination whether the probationer “needs treatment and, if so, the type or level of appropriate treatment.” *State v. Bradley*, 756 N.W.2d 129, 133 (Minn. App. 2008).

In this case, the district court found that there was clear and convincing evidence that Meierding was required to submit to a chemical-dependency evaluation, that a copy of the assessment was mailed to him, that the assessment stated that he is required to submit to random testing, and that he failed to comply with the testing requirement. The district court’s findings reflect the district court’s conclusion that Meierding received sufficient notice of the testing requirement and the procedures by which the requirement was to be fulfilled.

On appeal, Meierding contends that he did not receive sufficient notice of the random testing procedures from the probation agreement, the chemical-dependency assessment,

Anderson's letter to him, and Anderson's face-to-face contacts with him. Meierding further contends that the evidence does not conclusively show that he knew of the random testing procedures, although he does not actually deny that he knew of the testing procedures. Accordingly, Meierding contends that the district court violated his right to due process of law by imposing jail time without giving him fair warning of what he was required to do to comply with the conditions of his probation.

The record supports the district court's finding that Meierding received sufficient notice of the random testing procedures. At sentencing, the district court orally stated several conditions of probation, including the condition that Meierding "undergo a Rule 25 chemical dependency evaluation and follow[] any recommendations made." Meierding received a copy of his probation agreement, which states that he was required to "[c]omplete an alcohol assessment" and to "comply with [the] alcohol assessment." Anderson mailed Meierding a copy of the assessment, which states that Meierding must "participate in random testing to substantiate compliance" with the requirement that he not use alcohol or other intoxicants. MMDT sent written notice to Meierding of the procedures for submitting to random testing. A copy of MMDT's letter was introduced as an exhibit without objection. Anderson testified that she received a copy of the notice from MMDT, and Meierding has not denied that he received it. This evidence is sufficient to support the district court's conclusion that Meierding received sufficient notice of the random testing requirement and the procedures by which that requirement must be fulfilled.

Meierding contends that he did not have "fair warning" of the random testing requirements because he was not told to "be on the lookout for important mail from a drug

testing company,” that “drug testing instructions were coming under separate cover from a third party,” or that he needed to “open and read every piece of mail he received from any source.” The record reflects that the district court fully considered these factors and incorporated them into its decision. The district court found mitigating circumstances to exist because the notice that was given to Meierding was not as comprehensive as it could have been. The district court stated that “it would have been a better practice to have [information about testing] specifically identified in the letter from probation” and “more specific information provided to [Meierding] in person.” In this context, due process requires only “that a defendant be given an opportunity to show that even if a condition of probation was violated, mitigating circumstances exist such that the violation does not warrant revocation.” *Cottew*, 746 N.W.2d at 636. “A violation is mitigated where it was unintentional or excusable.” *Id.* Here, the district court concluded that Meierding’s violation was excused in part by the lack of clarity in the communications about the random testing procedures. The district court found mitigating circumstances to exist and declined to revoke probation. Thus, we conclude that Meierding received the process to which he was due.

In sum, the district court did not err by imposing an intermediate sanction of 21 days in jail for Meierding’s violation of a condition of his probation.

Affirmed.