STATE OF MINNESOTA
IN COURT OF APPEALS
A10-73

State of Minnesota,
Respondent,

vs.

Kevin Eugene Syas,
Appellant.

Filed August 10, 2010
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69DU-CR-09-1506

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

Melanie S. Ford, St. Louis County Attorney, Vernon D. Swanum, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, F. Richard Gallo, Jr., Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

CONNOLLY, Judge

Appellant appeals the revocation of his probation based on his discharge from the Teen Challenge program in Duluth. Appellant argues the district court abused its discretion in revoking his probation because (1) appellant's sentence and terms of probation included no deadline by which to complete the Teen Challenge program and appellant still had over four years of his probationary period remaining, and (2) although appellant was discharged by one of the program's facilities, he was conditionally accepted by another facility. Appellant also raises several pro se arguments. Because we conclude that the district court did not abuse its discretion in revoking appellant's probation and that appellant's pro se arguments are without merit, we affirm.

FACTS

On June 22, 2009, appellant Kevin Eugene Syas pleaded guilty to two counts of first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2008), and one count of financial transaction card fraud in violation of Minn. Stat. § 609.821, subd. 2(1) (2008). As part of the plea agreement, the state agreed to support a "dispositional departure contingent upon [appellant] entering and completing the Teen Challenge Program." Appellant was subsequently sentenced to two concurrent 129-month sentences and one concurrent 25-month sentence. All were stayed for five years. As one of the conditions of his probation, appellant was required to complete "Teen Challenge." Appellant entered the Teen Challenge program in Duluth and was subsequently discharged without completing the program. The record reflects that

appellant was discharged because he failed to abide by the facility's leave policy. The state alleged appellant had violated his probationary condition to complete the Teen Challenge program and sought to have appellant's stayed sentences executed.

A probation revocation hearing was held. At the hearing, appellant acknowledged that one of the conditions of his probation was completion of the Teen Challenge program. Appellant admitted that he was discharged from the program and that he called his probation officer and left a message, but did not report to him the next day. At the hearing, appellant's probation officer informed the district court that appellant had been conditionally accepted into the Teen Challenge program in Minneapolis, contingent upon the resolution of some funding issues. The probation officer recommended that appellant's probation be revoked. A "Mr. Miller" from the Teen Challenge program also testified and stated that appellant had trouble complying with the program's leave policy.

Defense counsel told the district court:

> I think it's important to say that this is not somebody that was removed from Teen Challenge. He was removed from the Duluth campus of Teen Challenge, while Hennepin County sends me a letter saying we will take him, we will take him, if he can get his Rule 25 funding under control, which I'm sure he can.

In his own statements to the district court, appellant emphasized that he was not discharged from the program as a whole, only the Duluth facility, and that the Minneapolis facility would be more suitable for him because of the racial composition of the participants.

The district court found that appellant failed to abide by the terms of his probation when he was discharged from the Duluth facility. The district court concluded that appellant was well aware that his probation included completion of the Teen Challenge program, observing that appellant himself admitted that he was discharged from the facility, and that there was no excuse for the violation. The district court noted appellant's extensive criminal history; his history of failing to comply with the terms of his probation in other cases; and the seriousness of the underlying offenses.[1] The district court concluded that appellant's argument that he be allowed to continue treatment at a different site was without merit and that appellant's confinement was necessary to protect public safety. The district court revoked appellant's probation and executed his sentences. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in revoking appellant's probation when he was discharged from the Teen Challenge program in Duluth.

"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). Before a person's probation is revoked, "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 need for confinement outweighs the policies favoring probation." *Id.* at 250. The finding of a violation must be supported by clear and convincing evidence.

[1] We note that, at the age of 36, appellant had 11 previous felony convictions.

Minn. R. Crim. P. 27.04, subd. 3(3) (2009). Whether the district court has made the required findings is a question of law and subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Appellant asserts that the district court erred in concluding that appellant violated a condition of his probation when he was discharged from the Duluth facility and conditionally accepted into the Minneapolis facility because appellant (1) was not directed to complete the Teen Challenge program at a particular facility, and (2) had until 2014 to complete the program. Appellant cites two unpublished opinions of this court to support his position: *State v. Davisson*, No. C3-98-1064, 1998 WL 747135 (Minn. App. Oct. 27, 1998), and *State v. Bruce*, No. A07-600, 2008 WL 2102893 (Minn. App. May 13, 2008). *See* Minn. Stat. § 480A.08(3) (2008) (stating unpublished opinions of this court are not precedential). These cases are not precedent and the facts make them distinguishable such that we do not find them persuasive.

A district court may revoke a defendant's probation at any time when it appears a condition has been violated or misconduct has occurred that warrants imposition or execution of the defendant's sentence. Minn. Stat. § 609.14, subd. 1 (2008). And while the purpose of probation is rehabilitation, revocation is an appropriate last resort when treatment has failed. *Austin*, 295 N.W.2d at 250. "There must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* When a person "has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation[,] . . . it [is] not unreasonable to conclude that treatment ha[s] failed." *Id.* at 251.

The district court's conclusion that appellant violated the terms of his probation is supported by clear and convincing evidence. Appellant's own actions were the reason for his discharge. Appellant knew completion of the Teen Challenge program was a condition of his probation and admitted to being discharged from the program. Based on appellant's discharge from the Duluth facility, including the reasons for the discharge as contained in the record, and appellant's history of failing to comply with the terms of his probation, it was not unreasonable for the district court to conclude that treatment had failed. *See Austin*, 295 N.W.2d at 251. The district court did not abuse its discretion by concluding that appellant violated the terms of his probation.[2]

II. Appellant's pro se arguments are without merit.

In his pro se reply brief, appellant reiterates that there was no deadline by which he was to complete the Teen Challenge program and that he was not required to attend a specific facility. It is true, as appellant asserts, that Minn. Stat. § 609.135, subd. 1c (2008), implicitly gives appellant until 60 days remain on his probation to complete treatment. *See* Minn. Stat. § 609.135, subd. 1c (allowing the prosecutor or probation officer to "ask the court to hold a hearing to determine whether the conditions of probation should be changed or probation should be revoked" if the defendant fails to successfully complete court-ordered treatment at least 60 days before the probation term expires). However, as stated above, the district court may revoke appellant's probation at any time when it appears that appellant has violated a condition of his probation. Minn.

[2] Appellant challenges only the finding of violation—he does not argue that violating these conditions does not warrant revocation. The district court considered the *Austin* factors and did not abuse its discretion in revoking appellant's probation.

Stat. § 609.14, subd. 1. Appellant was required to complete the Teen Challenge program. He admits that he was discharged from the Duluth facility.

Appellant also states that nowhere in the plea agreement does it state that completion of the Teen Challenge program was appellant's "last chance." The prosecutor's e-mail, which set forth the terms of the plea agreement and was specifically incorporated into and attached to the plea agreement, did not expressly use the phrase "last chance," but the message was nonetheless clear:

> If [appellant] fails to complete the Teen Challenge Program it would constitute a violation of the terms of his probation and his probation would be revoked and his sentence executed. *There should be no mistake, failure to complete the Teen Challenge Program would result in the execution of his underlying sentence.*

(Emphasis added.) *See State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming probation revocation when probationer took a job that interfered with required treatment program, which resulted in termination from the program, and record was clear that the district court had "made a downward dispositional departure for the sole reason of affording appellant one last opportunity to succeed in treatment for chemical dependency"), *review denied* (Minn. Feb. 13, 1987).

Finally, appellant argues that his revocation was erroneous because he never orally agreed to or signed the probation agreement. It appears that appellant did not raise this issue to the district court during the revocation proceedings. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, even if we were to consider

appellant's argument that his signature was required on the probation agreement, this argument is without merit. "'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.'" *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004) (quoting *United States v. Dane*, 570 F.2d 840, 843 (9th Cir. 1977)). "It follows that before a probation violation can occur, the condition alleged to have been violated must have been a condition actually imposed by the court." *Id.*; Minn. R. Crim. P. 27.03, subd. 4(E)(4) (2009) ("A written copy of the conditions of probation should be given to the defendant at the time of sentencing or soon thereafter."); *see also* Minn. R. Crim. P. 27.03, subd. 4(E)(5) (2009) ("The defendant should be told that in the event of a disagreement with the probation agent as to the terms and conditions of probation, the defendant can return to the court for clarification if necessary."). Appellant does not dispute that he was required to complete the Teen Challenge program. The sentencing judge's order required appellant to complete the program. Appellant admitted that he knew and understood completing the program was a condition of his probation, and admitted that he was discharged from the Duluth facility. Appellant does not provide any authority that he was required to agree to the terms of his probation for them to be effective, and caselaw suggests otherwise. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating appellate courts "will not consider pro se arguments on appeal that are unsupported by either arguments or citations to legal authority"), *cert. denied*, 129 S. Ct. 1624 (Mar. 23, 2009); *State v. Bennett*, No. A04-1450, 2005 WL 626782, at *4 (Minn. App. Mar. 15, 2005) ("There is no

requirement that a probationer agree to the condition."), *review granted in part, decision reversed in part*, 696 N.W.2d 788 (Minn. 2005). Because appellant was not required to agree to the terms of his probation and because it does not appear that appellant lacked fair warning as to the consequences of his failure to complete the program, appellant's pro se arguments are without merit.

Affirmed.