STATE OF MINNESOTA
IN COURT OF APPEALS
A10-908

State of Minnesota,
Respondent,

vs.

Jory Michael Behrends,
Appellant.

Filed February 8, 2011
Affirmed
Ross, Judge

Kandiyohi County District Court
File No. 34-CR-05-1961

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

Boyd A. Beccue, Kandiyohi County Attorney, Dain L. Olson, Assistant County Attorney, Willmar, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

ROSS, Judge

This appeal concerns whether the record in Jory Behrends's probation-revocation hearing supports the district court's decision to revoke his probation based on his use of

amphetamines and his failure to inform his probation officer of his prescribed pain medication. Behrends challenges the first basis because he asserts that evidence supporting it was introduced in violation of his constitutional right to confront witnesses. We hold that the district court had sufficient constitutional grounds to find that Behrends used amphetamines, and we hold that the violations provide sufficient grounds on which to revoke his probation, and therefore affirm on that basis. We do not reach the confrontation-rights issue.

FACTS

In 2007, Behrends pleaded guilty to a charge of third-degree drug possession. The court stayed adjudication conditioned on several probationary requirements. But Behrends twice violated those conditions before the end of that year, and the district court vacated the stay, adjudicated Behrends guilty, imposed a twenty-one months' stayed prison sentence, and returned him to probation. He violated his probation twice again, each time being ordered to spend a short time in jail and being released again on probation. All of Behrends's probation violations have involved drugs or alcohol.

This appeal arises from Behrends's fifth probation-violation hearing. Probation officer Cindy Kragenbring met with him on December 7, 2009. She asked him if he was sober, and he said he was. She asked him to submit to urinalysis testing, which he did. But the urinalysis indicated amphetamines. When Kragenbring confronted Behrends about the amphetamine detection, he told her that he had been using his sister-in-law's prescribed pain medication for a bad tooth. Four days later he again told her that he had used his sister-in-law's medication.

Behrends testified that in November he had obtained a pain-medication prescription after he had visited the emergency room experiencing tooth pain. He introduced evidence of a November 19 prescription for hydrocodone. He was again prescribed hydrocodone on December 8, one day after his drug test.

The district court revoked Behrends's probation and executed his twenty-one-month sentence. It based the revocation on its findings that Behrends used mood-altering chemicals not prescribed to him (amphetamines), and failed to inform his agent of his November prescription for mood-altering chemicals (prescribed pain-killers). Behrends appeals.

D E C I S I O N

Behrends challenges his probation revocation by arguing primarily that the district court's finding of drug use was unconstitutionally based on Kragenbring's allegedly confrontation-clause-violating testimony that Behrends tested "positive for amphetamine." He also contends that the district court's other basis for revocation—his failure to inform his probation officer of his prescription—is too minor an infraction to justify revoking his probation.

We first address the district court's illegal-use basis for revoking Behrends's probation. Behrends argues that the district court's finding that Behrends illegally used mood-altering drugs rests entirely on Kragenbring's testimonial-hearsay statement that Behrends's urine had tested "positive for amphetamine." He accurately emphasizes that, in criminal trials, this type of evidence would violate a defendant's Confrontation Clause rights under the Sixth Amendment as interpreted in *Crawford v. Washington*, 541 U.S.

36, 124 S. Ct. 1354 (2004). *See State v. Weaver*, 733 N.W.2d 793, 799 (Minn. App. 2007), *review denied* (Minn. Sep. 18, 2007) (holding that laboratory test results are testimonial hearsay). But this case does not involve a criminal trial; and a series of recent federal appeal cases have relied on *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 2600 (1972), to hold that the Confrontation Clause does not apply in probation-revocation hearings. *See, e.g.*, *United States v. Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005); *United States v. Kirby*, 418 F.3d 621, 627–28 (6th Cir. 2005); *United States v. Hall*, 419 F.3d 980, 985–86 (9th Cir. 2005); *United States v. Aspinall*, 389 F.3d 332, 342–43 (2nd Cir. 2004); *United States v. Martin*, 382 F.3d 840, 844 n. 4 (8th Cir. 2004).

We see no reason to follow a course rejected by these courts, but we need not decide the constitutional issue here. The district court's illegal-use finding is supported by Kragenbring's plainly *non*testimonial-hearsay statement that, after she confronted Behrends about his testing positive for amphetamines, on two occasions he attempted to explain the source of the amphetamines in his system by claiming that he was using his sister-in-law's medication for tooth pain. Behrends never questioned the validity of the positive test results; rather, he tried to explain them away. This tacit admission that he was using an amphetamine-containing substance—whether it was his sister-in-law's medication or another drug—supports the district court's finding regardless of Behrends's constitutional challenge to the admissibility of the drug test's positive result itself. Our view of the record is implicitly supported by the district court's statement, "I don't know how [his statement to Kragenbring] would even come up if he weren't taking his sister-in-law's medications. He could have easily said I have my own pills and I

didn't do it. You know I'm taking my own. *I think he lied to her*." We hold that Behrends's attempt to explain away the results of the amphetamine-positive test without attempting to deny its accuracy is sufficient grounds for the district court to infer by clear and convincing evidence that Behrends took an amphetamine-containing substance.

Having concluded that the district court's finding of illegal-use is supported by admissible evidence, we need not address Behrends's argument that his failure to report his prescription does not independently support revocation. We will instead analyze whether the two violative acts together support the revocation.

We review the trial court's decision to revoke Behrends's probation for abuse of discretion. *See State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). When revoking probation, the district court must conduct a threefold analysis and provide written "*Austin* findings." *State v. Modtland*, 695 N.W.2d 602, 605–06 (Minn. 2005). Whether the district court made the required *Austin* findings is a question of law that we review de novo. *Id*. at 605. We will address each finding in turn.

With regard to the first *Austin* finding, designating the basis for revocation, we hold that the district court properly found that Behrends "violated the terms of his probation by using mood altering chemicals not prescribed for him and by failing to inform his agent of his prescription for mood altering chemicals." The declaration that Behrends illegally used amphetamine-containing substances and was prescribed pain medication in November without telling his probation officer about it satisfies the district court's duty to provide the reason for revoking Behrends's probation.

We also hold that the district court properly made the second *Austin* finding, that "[t]hese are willful and inexcusable violations." It observed that Behrends "has been provided with chemical dependency treatment on several occasions [and] . . . had the ability to comply with the terms of his probation and chose to ignore the court's orders."

And finally, we hold that the district court properly made the third *Austin* finding, that the "need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. The district court considered not only Behrends's recent violations, but also the fact that he has "had four previous probation violation hearings" during which he admitted to violating probation, each time because of a chemical-related infraction. The court reasoned that "[t]he severity and the frequency of the violations demonstrate that [Behrends] is not amendable to probation," that "[i]t would unduly depreciate the seriousness of [Behrends's] conduct and probation violation to reinstate him on probation for a fifth time," and that "[t]he need for confinement outweighs the policies favoring probation." These findings are well supported by the record.

Affirmed.