STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1496

State of Minnesota,
Respondent,

vs.

Michael Daryl George,
Appellant.

Filed May 9, 2011
Affirmed
Connolly, Judge

Nicollet County District Court
File No. 52-CR-08-3

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

Michael K. Riley, Sr., Nicollet County Attorney, Michelle M. Zehnder Fischer, Assistant County Attorney, St. Peter, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and Ross, Judge.

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

CONNOLLY, Judge

Appellant challenges the revocation of his probation, arguing that the record lacks clear and convincing evidence that his violations were intentional or inexcusable and that the district court abused its discretion in concluding that the need for confinement outweighed the policies favoring appellant's continued probation. Because the record demonstrates that there was clear and convincing evidence to support the district court's findings and the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

On September 10, 2008, appellant Michael Daryl George pleaded guilty to one count of felony second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2006), for touching his granddaughter's vaginal area both over and under her clothing. A conviction for felony second-degree criminal sexual conduct carries a minimum presumptive executed sentence of 90 months. Minn. Stat. § 609.343, subd. 2(b) (2006).

Pursuant to a plea negotiation, the district court stayed execution of appellant's presumptive prison sentence and placed him on probation. The conditions of appellant's probation included abiding by all recommendations of the psychosexual evaluation completed by the CORE program; having no contact with minor children; having no direct or indirect contact with his granddaughter unless in written form and approved by appellant's probation officer, appellant's sex-offender therapist, and the granddaughter's

therapist; and abiding by all of the terms and conditions of the probation agreement as set by appellant's probation officer as well as being subject to polygraph exams.

Appellant participated in the CORE treatment program from March through September 2009. During the course of treatment, appellant disclosed that he had indirect contact with his granddaughter, telling his treatment group that "while his grandchildren were over that he was expected to be at another residence and that he had left that residence and returned home to his apartment and had watched the grandchildren who were swimming from the atrium area of his apartment." Although this was a violation of appellant's probation, appellant was allowed to continue participating in treatment because he disclosed the contact. On September 30, appellant was terminated from the CORE treatment program for failing to pay his monthly treatment costs.

Appellant was subsequently administered a polygraph exam at the request of his probation officer "for public safety reasons" and because "[the officer] wanted [appellant's] treatment program to know what they were dealing with prior to him returning to treatment." Among other things, the exam revealed that appellant continued to have contact with his granddaughter. The examiner wrote a report and sent it to appellant's probation officer and sex-offender therapist. The same day, appellant's probation officer filed a probation-violation report based on what appellant reported to the examiner.

A contested probation-violation hearing was held and appellant's probation officer and sex-offender therapist testified. The probation officer recommended that appellant serve a minimum of six months in jail. The sex-offender therapist stated that appellant

had been making some progress in treatment and recommended that appellant be allowed to return to treatment after receiving a correctional consequence and paying his outstanding treatment fees. The matter was continued to allow either the examiner to testify to the admissions appellant made or for a copy of the exam video to be provided to the district court. The parties subsequently stipulated to the introduction of the video under seal and no other witnesses were called.[1] The district court concluded that appellant violated the terms of his probation by continuing to have contact with minor children and viewing pornography in violation of his treatment conditions.

A disposition hearing followed and, at the close of the hearing, the district court stated that appellant's contact with his granddaughter and anyone under the age of 18 without approval of his probation officer,

> was a flagrant disregard for this Court's order, and you were aware that you could be sent to prison at any time. It was a mandatory commit to prison when you were first sentenced, and you received a very generous offer from the State. You blew that. And you blew it willfully, and voluntarily, and no one coerced you to do it. You just did it of your own accord.

The district court revoked appellant's probation and executed his sentence. The district court later issued an amended order, finding that appellant's violations were intentional and inexcusable and that the need for confinement outweighed the policies favoring probation as appellant posed a risk to public safety given his continued contact with minor children. The district court also observed that, despite being told at sentencing that any violation would likely result in the execution of his sentence, appellant intentionally

[1] The video contains only the pre-test phase of the exam and not the exam itself.

violated the terms of his probation, indicating that appellant was not amenable to probation and that the seriousness of appellant's violations would be diminished if appellant was not confined. Additionally, the district court found that appellant's treatment could more effectively be provided if he was confined. This appeal follows.

D E C I S I O N

A 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 revoking probation, the district court "must 1) designate the specific . . . conditions that were violated; 2) find that the violation[s were] intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation." *Id.* at 250. The state must prove by clear and convincing evidence that a violation has occurred. Minn. R. Crim. P. 27.04, subd. 3(1); *see* Minn. R. Crim. P. 27.04, subd. 2(1)(c)b (describing right of probationer to "a revocation hearing to determine whether clear and convincing evidence of a probation violation exists and whether probation should be revoked"). This court reviews de novo whether the district court made the required findings under *Austin*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

I. The district court's conclusion that appellant's probation violations were intentional and inexcusable is supported by clear and convincing evidence.

Appellant does not dispute that he violated the terms of his probation. Rather, appellant contends that the record lacked clear and convincing evidence that his violations were intentional or inexcusable and that "[his] statements to the polygraph

examiner were compelled and involuntary." In support of his position, appellant cites the imposition of polygraph testing at sentencing as a condition of his probation and the examiner's statements that appellant was required to follow his instructions and that appellant's responses would not get him into trouble.

First, appellant did not claim that his statements to the examiner were compelled or involuntary in the district court proceedings. Appellant stipulated to the introduction of the video and the record shows that defense counsel's concern was for the introduction of either testimony from the examiner or the video itself, not the examiner's report. We generally do not consider matters not brought to the attention of the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Thus, the issue of whether appellant's statements were compelled or involuntary is not properly before us.

Second, the record supports the district court's conclusion that the violations were intentional and inexcusable. The record reflects that appellant was well aware that he was prohibited from having contact with his granddaughter and other minor children without approval and that failure to abide by this condition was a violation of his probation. We therefore affirm the district court's conclusion that appellant intentionally and inexcusably violated the terms of his probation.

II. The district court did not abuse its discretion in concluding that the need for confinement outweighed the policies favoring probation.

"[O]nce an intentional or inexcusable violation has been found, the [district] court must proceed to an evaluation of whether the need for confinement outweighs the policies favoring probation." *Modtland*, 695 N.W.2d at 608. This evaluation requires

consideration of whether "confinement is necessary to protect the public from further criminal activity" perpetrated by the probationer, the probationer "is in need of correctional treatment which can most effectively be provided if he is confined," and the risk of depreciating the seriousness of the probationer's violation if probation is not revoked. *Austin*, 295 N.W.2d at 251 (quotation omitted). "This process prevents courts from reflexively revoking probation when it is established that a defendant has violated a condition of probation." *Modtland*, 695 N.W.2d at 608.

Appellant argues that "the district court reflexively found that the need for confinement outweighed the policies favoring probation [because] the evidence does not support a finding that treatment failed, or that appellant cannot be counted on to avoid anti-social activity." Appellant is correct that "[t]he 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. And, prior to revocation, there must be "a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotation omitted). However, as the state points out, "[a]ppellant surreptitiously engaged in risky behaviors while in treatment and on probation by having contact with young girls [and] having physical contact with [the] victim[]" and that this "blatant disregard [of] his most important probationary terms shows that he cannot be trusted to avoid engaging in further anti-social behavior." Appellant's probation officer testified that he did not believe appellant understood or accepted the no-contact condition and that, in pushing for contact, he felt appellant may be putting his own needs first. The district court likewise concluded:

> [Appellant] does pose a risk to public safety, particularly the safety of minor children. [Appellant] intentionally had contact with the victims, minor children, on multiple occasions, despite having participated in the CORE sex offender treatment program. . . . His treatment was therefore not effective. The presumptive sentence for [appellant's] offense was a 90-month commitment to prison. The stay of execution of sentence was a departure. [Appellant] was specifically told at sentencing that any probation violations would likely result in his being sent to prison. [Appellant] intentionally violated anyway, indicating he is not amenable to probation. It would diminish the seriousness of his violations if he were not confined. Any treatment that could be effective in addressing the issues underlying [appellant's] sexual offending behavior would most effectively be provided if he were confined.

Given appellant's continuing contact with minor children, including the victim of his crime, which was expressly forbidden as a condition of his probation, the district court did not abuse its discretion in determining that appellant's need for confinement outweighs the policies favoring his continued probation and in revoking appellant's probation.

Affirmed.