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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-15**

State of Minnesota,
Respondent,

vs.

Frederick William Hill,
Appellant.

**Filed August 22, 2011
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-07-018950

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, 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.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the revocation of his probation, arguing that he was denied due process and effective assistance of counsel at his probation-revocation hearing. Because we conclude that appellant received all of the constitutional protections to which he was entitled before the district court revoked his probation, we affirm.

FACTS

In November 2007, appellant Frederick William Hill pleaded guilty to first-degree burglary. The district court stayed appellant's 57-month sentence and put appellant on supervised probation for three years. As part of his probation, appellant was required to abstain from alcohol and drug use, comply with random testing, and remain law abiding. Appellant subsequently violated his probation, and in June 2008, appellant waived a contested probation-revocation hearing and admitted his violations. The state requested that the district court execute appellant's sentence, but the district court found that prison would be inappropriate at that time and renewed appellant's probation. The district court also ordered appellant to complete a chemical-dependency evaluation, to complete any recommendations resulting from the evaluation, and to comply with the previously ordered terms of probation.

In November 2008, appellant was accused of a second probation violation. He waived a contested probation-revocation hearing and admitted that he was arrested for suspected trespass and that he had failed to comply with previously ordered conditions of probation. The state again argued for execution of appellant's sentence, but the district

court continued probation in accordance with the recommendations of appellant's probation officer. Following the hearing, appellant completed a new chemical-dependency evaluation and eventually completed chemical-dependency treatment at Four Winds.

In 2009, appellant admitted to violating conditions of his probation for a third time. At the hearing, appellant's probation officer again recommended that the district court continue appellant's probation, but stated that "this would be the last opportunity that probation would recommend." The district court continued appellant's probation, stating that it was giving great weight to the probation officer's recommendation. The district court ordered an updated psychological evaluation and ordered appellant to comply with any recommendations. Following a chemical-dependency evaluation, appellant was sent to complete chemical-dependency treatment at the Mash-Ka-Wisen treatment center.

In July 2010, appellant was discharged from the Mash-Ka-Wisen treatment center and did not advise his probation officer of his whereabouts. As a result of being discharged, an arrest-and-detention order was issued for appellant's probation violation. Appellant refused to admit the violation and the district court held a contested probation-revocation hearing. Amy Barthels, appellant's probation officer, testified that appellant was discharged from Mash-Ka-Wisen for exhibiting intimidating behavior toward other clients. An exhibit introduced by the state outlined that appellant (1) made an inappropriate remark to staff during an event at the Black Bear Casino; (2) was found smoking a cigarette in his room and burning sage to hide the smell in violation of the

rules; (3) used intimidation with others in violation of the rules; and (4) was released due to noncompliance with the program. Barthels concluded that appellant was no longer amenable to probation based on his uncooperative behavior and recommended that the district court revoke his probation and execute his sentence.

The state also introduced appellant's discharge summary, which indicated that appellant's behavior began to deteriorate in his final month of treatment and that staff had held several interventions. Treatment staff concluded that appellant "was unable to see the seriousness of [his behaviors] and was unable to internalize the downward spiral that he was taking." Appellant's mother and Mark Mathews, an employee of the Health Recovery Center in Minneapolis, requested that the district court allow appellant to seek treatment at the Health Recovery Center for additional, diverse treatment.

The district court found that appellant violated the condition of probation that he complete any treatment recommended from his chemical-dependency evaluation and that the violation was inexcusable. The district court expressly found that "the policies favoring probation [were now] outweighed by the need for confinement." Based on the information submitted at the hearing and the fact that this was appellant's fourth probation violation, the district court revoked appellant's probation and executed his 57-month sentence with credit for time served. This appeal follows.

D E C I S I O N

I.

Appellant contends that he did not receive due process at his probation-revocation hearing because he was unable to present evidence that might have mitigated his

probation violation. Whether a due-process violation has occurred presents a question of constitutional law, which we review de novo. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). Due process requires 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. *Pearson v. State*, 308 Minn. 287, 290, 241 N.W.2d 490, 492 (1976). Mitigating circumstances exist when the violations are unintentional or excusable. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008).

Appellant argues that because the evidence submitted by the state was vague, his ability to obtain and present mitigating evidence related to his discharge from treatment was inhibited. We disagree. Appellant's discharge summary discussed appellant's behavior at treatment. In addition, the state provided a more thorough explanation for appellant's discharge, including inappropriate comments toward staff and smoking in his room. The exhibit identified "Lisa" from the treatment center as the individual who informed probation about appellant's discharge and the reasons for it.

Appellant did not request more information from the probation department or the treatment center when he received only the discharge summary in response to his subpoena. During the hearing, appellant's counsel did not ask appellant's probation officer any questions about the specifics of appellant's discharge and did not inquire into the three specific incidents alleged in the state's exhibit. Because appellant was given an opportunity to be heard on any mitigating circumstances surrounding his probation

violation, we conclude that appellant's right to due process was not violated at his probation-revocation hearing.

II.

Appellant alternatively argues that he received ineffective assistance of counsel at his probation-revocation hearing. In order to prevail on an ineffective-assistance-of-counsel claim, an appellant must allege facts that would “demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65 (1984)). If one prong of the analysis is determinative, we need not analyze both prongs. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Appellant contends that his counsel failed to properly advise him as to whether or not he should admit his violation, failed to effectively cross-examine the state's witness, and failed to provide a challenge or show circumstances that may have mitigated appellant's culpability. While we note that many of these challenges fall under the discretion afforded to counsel as “trial tactics,” we also conclude that appellant's claim fails for lack of prejudice. Even if counsel's performance was objectively unreasonable, appellant must still show that he was prejudiced as a result. *State v. Jones*, 392 N.W.2d 224, 236-37 (Minn. 1986). “Prejudice is determined by examining whether, under the totality of the circumstances, the result would have been different if counsel had not erred.” *State v. Lahne*, 585 N.W.2d 785, 790 (Minn. 1998) (quotation omitted).

Appellant offers no support for his argument that, but for counsel's representation, the district court would not have executed appellant's sentence. Appellant was discharged from treatment because he failed to follow the rules. This was appellant's fourth probation violation. Appellant's claim of ineffective assistance of counsel is without merit.

III.

In his pro se supplemental brief, appellant raises a number of additional arguments. One of these arguments is that the district court abused its discretion by revoking his probation. The district court has broad discretion to determine whether there is sufficient evidence to revoke probation and shall not be reversed absent a clear abuse of that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). 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." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The district court made the required findings on the record, and we conclude that the district court acted within its discretion by revoking appellant's probation and executing his sentence. We have considered the remaining issues raised in appellant's pro se brief and conclude that they have no merit.

Affirmed.