STATE OF MINNESOTA
IN COURT OF APPEALS
A14-1142

State of Minnesota,
Respondent,

vs.

Howard Forrest Risher,
Appellant.

Filed February 2, 2015
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. 55-CR-09-9732

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Appellant seeks reversal of his probation revocation and remand to the district court for probation reinstatement or a new probation-violation hearing. We affirm.

FACTS

In September 2010, appellant Howard Forrest Risher pleaded guilty to the crime of first-degree assault, which he committed in December 2008, and the district court granted Risher a downward dispositional departure from the presumptive guidelines sentence of 86 months, stayed imposition of sentence, and placed Risher on supervised probation. The conditions of probation included Risher's payment of $33,781 in restitution at the rate of not less than $200 each month and his performance of 250 hours of community service at the rate of not less than 10 hours each month.

In December 2012, Risher's probation officer (P.O.) reported to the district court that Risher had violated his probation by failing to pay restitution as required, failing to perform community service as required, failing to remain law-abiding by using/possessing marijuana and cocaine, and failing to complete a chemical-dependency evaluation as instructed by probation. After a probation-violation hearing, the court found that Risher had committed the alleged probation violations and that the violations were intentional or inexcusable. The court imposed an 86-month prison sentence but stayed execution of the sentence and continued Risher on probation with modified terms. The court increased Risher's restitution payments to a minimum of $250 each month, vacated the community-service condition, ordered Risher to cooperate "relative to any updated chemical dependency evaluations, and based upon those, enter into, make progress in and successfully complete any classes, treatment, counseling or other programming that may be recommended," and ordered Risher to abstain from using alcohol or any non-prescribed controlled substance.

In February 2014, Risher's P.O. reported to the district court that Risher had violated his probation by failing to pay restitution at the required rate, failing to follow recommendations of a chemical-dependency evaluation, and using/possessing marijuana. After a probation-violation hearing, the court found that Risher had committed the alleged violations, that the violations were intentional and willful, and that "the policies favoring incarceration far outweigh the policies favoring continued probation." The court revoked Risher's probation and executed his 86-month prison sentence.

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. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted). If a district court finds that a defendant violated a condition of his probation after receiving a stay of execution, the court has "two basic options . . . : (1) 'continue such stay and place the defendant on probation or order intermediate sanctions . . . ,' or (2) 'order execution of the sentence previously imposed.'" *State v. Barrientos*, 837 N.W.2d 294, 298–99 (Minn. 2013) (quoting Minn. Stat. § 609.14, subd. 3(2) (2012)). "To revoke probation and execute the sentence, however, the district court must make certain findings required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980)." *Id.* at 299. Specifically, the court must find that the defendant violated a "specific condition or conditions" of his probation, that "the violation was intentional or inexcusable," and that

the "need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250.

In determining whether the need for confinement outweighs the policies favoring probation, the district court "must bear in mind that policy considerations may require that probation not be revoked even though the facts may allow it and that the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quotations omitted). The court also "must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base [its] decisions on sound judgment and not just [its] will." *Id.* at 606–07 (quotations omitted). The court "should refer" to the 1970 American Bar Association Standards for Criminal Justice statement that

> [r]evocation followed by imprisonment should not be the disposition . . . unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Austin, 295 N.W.2d at 251 (quotation omitted).[1]

[1] "In the years since *Austin*, the ABA has amended the standards and removed this statement. *See* ABA Standards for Criminal Justice: Sentencing 18-7.3 cmt. (3d ed.

Conceding that the district court did not abuse its discretion by finding that he intentionally and willfully violated conditions of his probation, Risher challenges the court's third *Austin* finding—that the need for confinement outweighs the policies favoring probation. Risher argues that the court improperly relied on and "emphasized" Risher's receipt of a downward dispositional departure, "failed to exercise its broad discretion," and "failed to consider, on the record," the three factors from the 1970 ABA statement (ABA factors).

We have found no authority to support Risher's assertion that a district court may not take into account a defendant's receipt of a downward dispositional departure when considering the third *Austin* factor. Indeed, because "[the supreme court] ha[s] held that a defendant's particular amenability to individualized treatment in a probationary setting will justify [a downward dispositional] departure" from a guidelines sentence, *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (emphasis omitted) (quotation omitted), requiring a district court to completely disregard an abortive downward dispositional departure could hamper its ability to weigh the need for confinement against the policies favoring probation. Risher's argument that the district court abused its discretion by merely considering his downward dispositional departure is unpersuasive.

Risher argues that the district court abused its discretion because it "emphasized" and "seemingly placed great significance" on his downward dispositional departure. Construed broadly, Risher's argument seems to suggest that the court allowed the

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1994). In 2005, however, th[e] [supreme] court repeated Austin's direction to follow the 1970 draft in *Modtland*." *Osborne*, 732 N.W.2d at 253.

downward dispositional departure to automate its finding that the need for confinement outweighs the policies favoring probation. We acknowledge that "[t]he decision to revoke probation cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Osborne*, 732 N.W.2d at 253 (quotation omitted). But here, the court highlighted the significance of Risher's receipt of a downward dispositional departure by characterizing the departure as an initial "tremendous break" that was followed by Risher's demonstration of "a disregard for probation" even as "the legal system was leaning over backwards to try to help [him]." The court expressly "ignor[ed]" Risher's 2013 and 2014 violations of the restitution condition and his 2013 violation of the community work service condition, focusing instead on Risher's 2013 violations of conditions requiring him to remain law-abiding and to follow all instructions of probation, and on his 2014 violations of conditions requiring him to follow recommendations of the chemical-dependency evaluation and to abstain from using any non-prescribed controlled substance.

We conclude that the court did not "reflexive[ly] react[] to an accumulation of technical violations." *See id.* Rather, the court properly considered the departure as relevant to, but not determinative of, its weighing of the need for confinement against the policies favoring probation.

Risher argues that the following colloquy reveals that the district court "did not believe continued probation was an option at its disposal," that the court believed that "it had no other alternative than to revoke . . . Risher's probation," and that the court "failed

to exercise its broad discretion" by "fail[ing] to truly consider whether the mitigating circumstances surrounding . . . Risher's case outweigh[] the factors supporting revocation":

> THE COURT: You know, actually, I don't personally want to send you to prison. I'd like to figure out a way not to do that but you heard this long analysis that I did of the record. . . .
> RISHER: Yes, sir.
> THE COURT: And with the exceptions that I allowed, you should have been perfect on this. Just for that alone. But I—I don't see that I really have any—any choice in the matter. I really—I really don't.

But the above colloquy does not stand alone in the record. The colloquy occurred near the end of the probation-violation hearing, after the district court heard testimony from Risher's P.O., another P.O. who was responsible for monitoring Risher's restitution payments, and Risher, and heard argument from the state, Risher's attorney, and Risher. The record reflects that the court focused on Risher's use of chemicals, his failure in chemical-dependency treatment, and his lack of probation amenability; carefully considered Risher's circumstances; and did not fail to exercise its broad discretion in weighing the need for confinement against the policies favoring probation.

Citing *State v. Scholberg*, 393 N.W.2d 247, 249 (Minn. App. 1986), in which this court stated that "the supreme court requires reference by the trial court to [the 1970 ABA statement]," Risher argues that the district court "failed to consider, on the record," the ABA factors. But in *Austin*, the supreme court suggested that a district court's consideration of the ABA statement is encouraged but not required. *See Austin*, 295 N.W.2d at 251 (stating that "[t]o insure that both the probationer's and the public's needs

are served, the trial courts *should* refer to" the ABA statement (emphasis added)). And more recently, the supreme court stated that "[p]ublic policies favoring probation . . . limit revocation to those situations where" at least one of the ABA factors is satisfied, without mentioning any requirement of an on-the-record consideration of the ABA statement. *See State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008). In sum, we have found no authority to support Risher's assertion that a district court must consider the ABA factors *on the record* in order to find that the need for confinement outweighs the policies favoring probation.

We conclude that the court did not abuse its discretion by finding that Risher's need for confinement outweighs the policies that favor probation.

Affirmed.