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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-333**

State of Minnesota,
Respondent,

vs.

Nakoya Lee Van Wert,
Appellant.

**Filed October 24, 2011
Reversed and remanded; motion granted
Stauber, Judge**

Becker County District Court
File No. 03-CR-08-961

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

Michael Fritz, Becker County Attorney, Gretchen D. Thilmony, Assistant County
Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges a district court order revoking his probation. Because respondent's appendix contains documents that are not part of the district court record, we grant appellant's motion to strike. Because the record does not contain sufficient indicia to ensure the reliability of the urinalysis-test result, we reverse the district court's revocation of appellant's probation and remand for a determination as to whether the remaining probation violations are sufficient to revoke appellant's probation.

FACTS

Appellant Nakoya Lee Van Wert went to a party for his 18th birthday at V.W.'s residence on April 13, 2008. Appellant consumed a substantial amount of alcohol at the party. Appellant observed D.D. physically assaulting V.W. When appellant attempted to stop the assault, a fight broke out between appellant and D.D. E.D. attempted to intervene, and he was stuck with a knife, ultimately requiring surgery for a stab wound.

On January 27, 2009, appellant pleaded guilty to first-degree assault, agreeing that witnesses would testify that he stabbed E.D. in the neck. The district court found that appellant knowingly waived his rights and that there was a factual basis for the plea. On March 2, appellant was sentenced to 86 months in prison, stayed for 20 years.

On August 11, 2010, appellant was accused of violating his probation by failing to follow the recommendations of a chemical-use assessment and testing positive for opiates. Appellant admitted to the violations on August 24. The district court reinstated

appellant's probation, ordered that he serve additional jail time as a sanction, and ordered appellant to complete a chemical-dependency evaluation.

On October 13, appellant was again accused of violating his probation by failing to follow the recommendations of his chemical-use assessment and testing positive for benzodiazepines. A contested probation-revocation hearing took place on November 24, where the state presented the testimony of Tony Ortloff, a probation officer with the Minnesota Department of Corrections. Ortloff testified that appellant tested negative for benzodiazepines on October 11, but was retested after staff at the treatment center where appellant was staying discovered that clients were using other clients' urine from condoms when taking drug tests and condoms had been found in appellant's room. Ortloff testified that the second test—conducted on October 12—tested positive for benzodiazepines.

The district court revoked appellant's probation and executed his 86-month sentence. This appeal follows.

D E C I S I O N

I. Motion to Strike

The state's appendix contains appellant's discharge summary from Pine Manors, Inc., the treatment center where appellant was staying, and a letter from the program director at Recovery Works addressed to appellant's attorney. Because neither document is contained in the district court file, appellant moved to strike the documents from the appendix and the references made thereto in the state's brief. The state did not respond to the motion.

The record on appeal is comprised of “[t]he papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any.” Minn. R. Crim. P. 28.02, subd. 8. An appellate court generally may not base its decision on matters outside the record. *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003). Here, while appellant’s discharge summary was discussed on the record and apparently reviewed by the district court, it was not received—or even offered—into evidence. And there is no reference in the record to the letter sent to appellant’s attorney. We therefore grant appellant’s motion to strike appellant’s discharge summary and the letter sent to appellant’s attorney from respondent’s appendix, as well as all references made to it in the brief. *See Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 543–44 n.7 (Minn. 2001) (granting motion to strike material in appendix that was not a part of the district court record and all references in the brief made thereto).

II. Probation revocation

The district court has broad discretion to determine whether there is sufficient evidence to revoke a defendant’s probation, and we will reverse the district court only if it clearly abused that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Before revoking a defendant’s probation, the district court must (1) identify the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). A probation violation must be proved by clear-and-convincing evidence. *See* Minn. R. Crim. P. 27.04, subd. 2

(permitting probation revocation on finding clear-and-convincing evidence of probation violation).

To establish foundation for the admissibility of a field-test result, the proponent of the test must show that (1) the test was performed by a properly trained person and (2) the test was pursuant to approved training. *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977). The administration of the test is trustworthy when “there is a sufficient indicia of reliability or a showing of the steps necessary to ensure reliability.” *Ahrens v. Comm’r of Pub. Safety*, 396 N.W.2d 653, 655 (Minn. App. 1986) (citation omitted).

The record indicates that appellant tested positive for benzodiazepines after staff at Pine Manor learned that “some clients” were using urine from a different client held in a condom, and a search revealed that appellant had condoms in his room. This evidence was introduced through Ortloff’s testimony. Noticeably absent from Ortloff’s testimony, however, is information as to who administered the test or what procedures were followed during the admission of the test. On this record, the evidence falls short of the standard expressed in *Dille*, and the urinalysis result therefore lacked sufficient foundation to be admissible. The district court therefore abused its discretion by considering the urinalysis result indicating that appellant had tested positive for benzodiazepines, and we reverse the revocation of appellant’s probation on this ground.

However, the district court found that appellant had committed three violations of his probation: not abstaining from the use of alcohol or non-prescribed drugs; not completing an eight-hour program; and not completing the treatment program at Pine Manor. Appellant does not challenge the remaining probation violations on appeal. But

it is unclear from the record whether the other two violations are sufficient to sustain the probation revocation in the absence of the failed drug test. We therefore remand the matter to the district court for consideration as to whether the remaining probation violations are sufficient to revoke appellant's probation.

We also note that appellant's failure to complete the treatment program at Pine Manor may have been a consequence of the urinalysis test indicating that appellant had used benzodiazepines, the issue upon which this reversal is based. We express no opinion as to whether the fact that the state did not lay sufficient foundation for the admissibility of the test result has any effect on Pine Manor discharging appellant for using non-prescribed drugs. That determination is left for analysis by the district court on remand.

Reversed and remanded; motion granted.