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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-747**

Nicholas Edward Tobin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 12, 2011
Affirmed
Bjorkman, Judge**

Ramsey County District Court
File No. 62-K6-06-003529

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

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's order denying his postconviction petition, arguing that his probation should not have been revoked because his probation violation was unintentional. We affirm.

FACTS

On September 13, 2006, respondent State of Minnesota charged appellant Nicholas Tobin with two counts of first-degree criminal sexual conduct involving his ten-year-old sister. At the time of the offenses, in 2001 and 2002, Tobin was 14 years old. Tobin was certified as an adult, and he pleaded guilty to one count of first-degree criminal sexual conduct. In February 2007, the district court sentenced Tobin to 144 months' imprisonment, but stayed execution, placing him on probation for 30 years, conditioned on his successful completion of in-patient sex-offender treatment.

Tobin entered in-patient sex-offender treatment at Alpha Human Services. On March 16, 2009, Alpha Human Services terminated Tobin from the program because he inappropriately propositioned another patient.

On April 27, 2009, the district court held a hearing during which Tobin admitted that he violated the treatment condition of his probation. The district court continued Tobin's probation on the same terms but ordered him to serve 365 days in the Ramsey County workhouse (and participate in the Pathfinders sex-offender program while in the workhouse) as a consequence of the violation. In addition, the district court ordered

Tobin to resume in-patient treatment at Alpha Human Services at his own expense following his release from the workhouse.

Tobin subsequently learned that he would not have the resources to pay for in-patient treatment at Alpha Human Services. Consequently, on October 13, 2009, Tobin's probation officer reported a violation of the terms of his probation. The district court found that Tobin violated the treatment condition of his probation, determined that out-patient sex-offender treatment was not adequate, vacated Tobin's probation, and imposed the 144-month sentence.

On September 28, 2010, Tobin brought a petition for postconviction relief, arguing that the district court should reinstate him on probation because his inability to pay for treatment does not constitute an "intentional" violation of probation. The district court denied Tobin's petition. This appeal follows.

D E C I S I O N

A district court's decision on a postconviction petition will not be reversed absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). On appeal of a postconviction decision, we review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Tobin argues that the district court abused its discretion by denying his postconviction petition because the record does not support the district court's finding that he intentionally or inexcusably violated his probation. Generally, a district court cannot revoke probation unless it designates the condition that was violated, finds that the violation was intentional or inexcusable, and finds that the need for confinement

outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). But probation may also be revoked if it is premised on the completion of a treatment program that is not available and the policies favoring probation are outweighed by the need for confinement. *State v. Morrow*, 492 N.W.2d 539, 543-44 (Minn. App. 1992); *State v. Thompson*, 486 N.W.2d 163, 165 (Minn. App. 1992).

In *Morrow*, the district court placed the defendant on probation conditioned on the successful completion of in-patient sex-offender treatment. 492 N.W.2d at 542. The defendant was unable to pay for the treatment program and was unsuccessful in seeking funding from the county and other sources. *Id.* The district court revoked his probation and executed Morrow's stayed prison sentence. *Id.* Morrow appealed, arguing that his failure to pay was not an "intentional" violation of probation. *Id.* We affirmed, acknowledging that because the violation of probation was not due to the defendant's misconduct, the "rationale of *Austin* is not fully applicable" and concluding that probation can be revoked for reasons other than the defendant's intentional or inexcusable violation of a probation condition. *Id.* at 543-44 (citing *Thompson*, 486 N.W.2d at 165).

As in *Morrow*, the district court placed Tobin on probation conditioned on successful completion of in-patient treatment that he could not afford. The district court reasoned that in-patient treatment was a critical condition of Tobin's probation and found that "the policies favoring probation are outweighed by the need for incarceration." The district court stated that "if [it] did not execute the sentence . . . [it] would unduly depreciate the seriousness of this violation" and treatment would "be better provided for

[Tobin] while in the custody of the Commissioner of Corrections.” The record amply supports the district court’s findings.

On this record, we conclude that the district court did not abuse its discretion in revoking Tobin’s probation and that Tobin is not entitled to postconviction relief on this basis.

Affirmed.