STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1727

State of Minnesota,
Respondent,

vs.

David Donald Uhde,
Appellant.

Filed April 29, 2013
Affirmed
Cleary, Judge

Watonwan County District Court
File No. 83-CR-08-604

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

Stephen Lindee, Watonwan County Attorney, Charles W. Hanson, Assistant County Attorney, St. James, Minnesota (for respondent)

Steven J. Wright, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Cleary, Judge; and Hooten, Judge.

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

CLEARY, Judge

Appellant challenges the revocation of his probation following a felony-level driving while impaired (DWI) conviction. He argues that the district court abused its

discretion by revoking probation because there is insufficient evidence to support the court's conclusions that his probation violation was inexcusable and that the need for confinement outweighs the policies favoring probation. Because the district court did not abuse its discretion by revoking appellant's probation, we affirm.

FACTS

Appellant David Uhde's criminal history includes six misdemeanor- and gross-misdemeanor-level DWI offenses. Appellant's seventh DWI offense was charged as a felony due to his criminal record, and appellant received a stayed sentence of 42 months for the offense. Appellant violated the terms of his probation and, just two weeks after he received the stayed sentence, the sentence was executed in May 2003.

In August 2008, while on conditional release from prison, appellant was again arrested for DWI. Appellant pleaded guilty to first-degree DWI, his eighth DWI offense and second felony-level DWI offense, and received a stayed sentence of 54 months, despite the presumption of a 54-month commitment under the Minnesota Sentencing Guidelines. Appellant was placed on probation for seven years in Watonwan County and ordered, among other things, to participate in and successfully complete a drug court program, abstain from the use of alcohol and controlled substances, refrain from having alcohol or controlled substances in his residence, and submit to random drug and alcohol testing. Appellant began to participate in drug court in Watonwan County, but in December 2009, he moved to Crow Wing County, and his probation supervision was transferred to that county. Crow Wing County would not accept appellant into its DWI

or drug court programs because of his criminal record, and the requirement that appellant participate in and successfully complete drug court was suspended.

In June 2012, appellant was arrested for a domestic incident that occurred at his home, and a breath test revealed that he had a .281 alcohol concentration. A probation-violation report was filed and, during a subsequent hearing, appellant admitted that he violated the terms of his probation by failing to abstain from the use of alcohol. Appellant explained that he was sad and depressed and "made a mistake" by turning to alcohol instead of contacting his sponsor or support group. He stated that he drank "[c]lose to a liter bottle of vodka" in "a short period of time." He further stated that he had been sober for 46 months from August 2008 to June 2012. The state requested that appellant's 54-month sentence be executed, while appellant asked that he be allowed to remain on probation and receive treatment in the community. Testimony was taken from Andrea Stevens, a corrections agent who had formerly supervised appellant's probation and who recommended execution of his sentence.

The district court issued an order revoking appellant's probation and executing his 54-month sentence. In the order, the court found that the crime of DWI "involves a very serious threat to public safety" and that "there is a substantial public safety risk when a person with eight prior DWIs consumes alcohol under any circumstances particularly when [he gets] to a level which is at least four times the legal limit." The court stated that alternatives to incarceration included treatment, evaluations, and jail time, but found that "none of these requirements could reasonably guarantee public safety due to the immediacy of danger should [appellant] choose to drink to a high level and then make the

inebriated decision to drive." The court also stated that "[i]t is difficult to monitor [appellant's] probation status" given that he cannot participate in drug court, but that appellant "can receive treatment in prison which could be more effectively monitored if he is confined." The court concluded that appellant violated the terms of his probation by consuming alcohol, that the probation violation was "intentional and inexcusable," that "the need for confinement outweighs the policies favoring probation," that "[t]here are no reasonably feasible alternatives to protect the public from further criminal activity," and that "[i]t would unduly depreciate the seriousness of the violation if probation were not revoked." This appeal followed.

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). Although a district court has broad discretion, it must make findings on specific factors before revoking probation. *State v. Modtland*, 695 N.W.2d 602, 605–06 (Minn. 2005). Before probation may be revoked, a 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 the need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. Appellant challenges the district court's conclusions under the second and third *Austin* factors. For the reasons explained below, we hold that the district court did not abuse its discretion by revoking appellant's probation.

Intentional or Inexcusable Probation Violation

There is sufficient evidence to support the district court's conclusion that appellant's probation violation was intentional and inexcusable. Appellant knew that the terms of his probation required that he abstain from the use of alcohol and refrain from having it in his residence. He stated at the hearing that he drank "a lot" of alcohol because he was sad and depressed. He admitted that he knew he should have contacted his sponsor or support group rather than turning to alcohol, but that he "made a mistake."

Appellant argues that this behavior was not inexcusable because he "managed to maintain his sobriety for 46 months," only "broke down and drank on one occasion," and stayed at home while drinking rather than attempting to drive. This argument is unpersuasive. The terms of appellant's probation did not merely require him to abstain from drinking and driving, but required him to abstain from drinking or possessing alcohol entirely. Moreover, maintenance of sobriety for 46 months does not excuse or justify appellant's alcohol intake when he had been ordered to abstain from drinking or possessing alcohol for the entire seven-year period of probation.

The Need for Confinement Outweighs the Policies Favoring Probation

"The purpose of probation is rehabilitation[,] and revocation should be used only as a last resort when treatment has failed" and "the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 250–51 (quotations omitted). "There must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* at 250.

> Public policies favoring probation further limit revocation to those situations where "(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."

State v. Cottew, 746 N.W.2d 632, 636 (Minn. 2008) (quoting *Austin*, 295 N.W.2d at 251 (quotation omitted)).

The district court determined that the need for confinement outweighs the policies favoring probation because confinement is necessary "to protect the public from further criminal activity," appellant "can receive treatment in prison which could be more effectively monitored if he is confined," and "[i]t would unduly depreciate the seriousness of the violation if probation were not revoked." Appellant challenges each of these conclusions.

There is sufficient evidence to support the district court's conclusion that confinement is necessary to protect the public from further criminal activity by appellant. As the district court stated, the crime of DWI "involves a very serious threat to public safety." Appellant's criminal record contains eight DWI convictions. Appellant argues that he is not a danger to the public because he maintained his sobriety for 46 months and, on the one occasion that he did drink, his alcohol intake was not criminal because he drank at home and made no attempt to drive. But although he may have remained sober for 46 months, appellant's behavior shows that he may turn to alcohol and become extremely intoxicated if sad or depressed. His criminal record indicates that, while

intoxicated, he may well make the decision to get into a vehicle and drive, which puts the public at serious risk.

There is sufficient evidence to support the district court's conclusion that appellant is in need of correctional treatment that can most effectively be provided if he is confined. DWI or drug court is not available to appellant where he resides. Appellant stated at the hearing that he was attending sobriety meetings, had sponsors, needed treatment, and wanted to get treatment in the community. But the district court explained that "[i]t is difficult to monitor [appellant's] probation status," and this is supported by Stevens's statement that appellant's activity with sponsor and support meetings "wasn't able to be verified" and the prosecutor's statement that, while the court could order a specific condition of probation such as attendance at more meetings, "the reality of how it can be monitored, I'm not sure." On the other hand, corrections agent Stevens testified that treatment would be available to appellant if he were incarcerated, and appellant testified that he would participate in treatment if incarcerated. Appellant has questioned whether a treatment program will actually be available to him in prison, but provided no testimony to contradict Stevens' statement that treatment will be available. Appellant argues that he did receive treatment while in prison for his first felony-level DWI offense, and the fact that he has continued to drink since being released from prison shows that his treatment while confined was ineffective. But appellant has also received treatment in the community and has continued to drink, indicating that this treatment was likewise ineffective.

There is sufficient evidence to support the district court's conclusion that it would unduly depreciate the seriousness of the probation violation if probation were not revoked. Appellant has a criminal record of eight DWI offenses, for one of which he was previously incarcerated. The guideline sentence for his second felony-level DWI offense was a presumptive 54-month commitment, but this sentence was stayed provided appellant comply with terms of probation that included abstaining from any use or possession of alcohol. Although appellant may have maintained his sobriety for 46 months, he nonetheless failed to comply with that term of probation when he became extremely intoxicated, which is a serious probation violation given his history and criminal record.

Affirmed.