STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1417

State of Minnesota,
Respondent,

vs.

Jessica Lynn Maack,
Appellant.

Filed June 12, 2017
Affirmed
Bjorkman, Judge

Douglas County District Court
File No. 21-CR-15-911

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

Chad Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

BJORKMAN, Judge

In this probation-revocation appeal, appellant argues (1) the district court abused its discretion because the state failed to prove she violated the conditions of her probation and

the need for confinement does not outweigh the policies favoring probation and (2) she is entitled to be resentenced in accordance with the 2016 Minnesota Drug Sentencing Reform Act. We affirm.

FACTS

On May 23, 2015, appellant Jessica Lynn Maack was pulled over for driving after revocation. Law enforcement officers discovered drug paraphernalia and a small amount of marijuana in her purse. An officer who later returned to the scene discovered three hypodermic needles hidden in the grass. One of the needles contained a trace amount of methamphetamine.

Respondent State of Minnesota charged Maack with fifth-degree controlled-substance crime, driving after revocation, possession of a small amount of marijuana, and possession of drug paraphernalia. On December 8, Maack pleaded guilty to fifth-degree controlled-substance crime in exchange for the state's dismissal of the other charges. That same day, the district court stayed adjudication and placed Maack on probation for five years.

On May 2, 2016, the state filed a probation-violation report. At the May 9 probation-revocation hearing, Maack admitted that she violated probation by using intoxicants. The district court revoked the stay of adjudication, stayed imposition of sentence, and ordered Maack to serve an intermediate sanction of 45 days in jail. The district court directed Maack to complete an updated chemical-dependency evaluation and follow all recommendations. Maack was permitted to participate in work release while serving her 45-day sentence.

On May 25, the state filed a second probation-violation report. The report indicated that Maack violated the terms and conditions of probation by failing to complete an updated chemical-dependency evaluation, failing to follow the instructions of probation, and failing to sign releases of information as directed. The alleged violations stemmed from two incidents. First, on the evening of May 9, corrections department personnel observed Maack walking around Walmart when she was supposed to be out on work release. Maack initially denied being there but later told her probation officer that she was there to buy rain gear. When asked to produce the sales receipt, Maack declined. Second, on May 19, an employee of Douglas County Social Services met with Maack to conduct an updated chemical-dependency evaluation. Maack refused to sign any releases or documents necessary to set up her chemical-dependency programming, told the evaluator to "f-ck off," and indicated that if she were sent to inpatient treatment she would "run away."

During the June 3 probation-revocation hearing, Maack asserted that she had cured the three alleged violations by completing a chemical-dependency evaluation and signing releases. The district court found that she committed the violations, that the violations were intentional and inexcusable, and that the need for confinement outweighed the policies favoring probation. The district court revoked Maack's probation, vacated the stay of imposition, and sentenced her to 12 months and one day in prison. Maack appeals the revocation order.

D E C I S I O N

I. The district court did not abuse its discretion in revoking Maack's probation.

The state must establish that an offender violated probation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c)(b). Before revoking an offender's probation, 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 need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Revocation "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." *Id.* at 251 (quotations omitted). A district court has broad discretion to determine whether there is sufficient evidence to revoke probation and will not be reversed absent an abuse of discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

A. Maack violated conditions of her probation.

Maack argues that the district court abused its discretion because her alleged conduct did not violate any probation conditions imposed by the court. *See id.* at 80 (stating a condition must have been "actually imposed" by the district court to be the basis of a finding of a probation violation). She specifically asserts that her (1) presence at Walmart and refusal to produce the receipt, (2) initial refusal to sign releases, and (3) refusal to sign the probation agreement, cannot provide a basis for finding her in violation of probation. We are not persuaded.

First, Maack is correct that the district court did not impose any specific conditions about shopping at Walmart or producing sales receipts. But the record shows that the district court's findings with respect to the Walmart incident related to Maack's overall pattern of defiant behavior. The district court found that Maack displayed an "obstruction response" and was "not cooperating whatsoever" with probation. The record amply supports these findings. Probation staff recounted numerous occasions on which Maack had failed to cooperate—notably, her hostile behavior toward the chemical-health evaluator and her defiant behavior toward her probation officer, including hanging up during his phone calls, telling him she did not have to listen to him while in jail, and refusing to answer questions. And the probation-violation report indicates that Maack was "not able to comply with the bare minimal expectations" of following the directions of probation and was "not cooperating with probation supervision."

Second, Maack acknowledges that she did not initially sign releases when asked to do so by her probation officer. But she argues that her probation conditions did not include a time frame for doing so. We disagree. The district court ordered Maack to sign releases of information "as directed." She plainly refused to do so.

Third, we are not persuaded by Maack's contention that because the term "probation agreement" connotes mutual assent of both parties, by definition, the "agreement presupposed a voluntary right by the probationer to not immediately agree to the proposed terms." The cases she cites concern contract negotiations; she cites no legal authority for the proposition that a probationer may negotiate the terms and conditions of probation. Maack's reliance on Minn. R. Crim. P. 27.03, subd. 4(E)(5), which states that a probationer

may seek judicial review of a probation term, is misplaced. The rule permits a probationer to ask the district court for clarification of an existing probation condition. It does not allow a probationer to challenge the inclusion of a term she disagrees with.

In sum, the record supports the district court's findings that Maack knowingly and intentionally violated probation conditions by failing to follow her probation officer's instructions, and refusing to sign releases and the probation agreement as directed.[1]

B. The district court did not abuse its discretion in determining the need for confinement outweighs the policies favoring probation.

In assessing the third *Austin* factor, the district court must balance the offender's interest in remaining at liberty against the state's interest in rehabilitation and public safety by considering whether:

> (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 [s]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 250-51.

The district court found that Maack's need for confinement outweighs the policies favoring probation based on all three grounds. Maack argues that she does not present a danger to the public, studies have shown that treatment is more effective than prison for

[1] The district court also found that Maack failed to complete an updated chemical-dependency evaluation. We note that Maack did complete an updated evaluation prior to the revocation hearing. But because the record supports the district court's findings on the other two violations, any error related to this finding does not require reversal.

low-level drug offenders, and any violation was technical and therefore revocation was a reflexive reaction to technical violations. We disagree.

When making *Austin* findings, a district court should "seek to convey [its] substantive reason[] for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). The district court explained that the need for confinement outweighs the policies favoring probation because Maack was "quite frankly refusing, and quite obviously refusing to cooperate with probation" and "not cooperating whatsoever." The record supports this determination. Maack lied to and was defiant and hostile in her interactions with her probation officer, the chemical-health evaluator, and other support staff; she told the evaluator that she would run away from treatment; and she generally refused to sign the releases and other documents necessary to enter and complete her treatment. Her probation officer testified that she did not follow his instructions, that she told him she did not have to do anything without her attorney's approval, and that his attempts to gain her cooperation had "gotten nowhere."

On this record, we conclude the district court did not clearly err in finding that the need for confinement outweighs the policies favoring probation. This case does not involve an accumulation of technical violations. To the contrary, Maack's behavior displays a complete unwillingness to cooperate with probation, including addressing the chemical use that underlies her conviction. Accordingly, we discern no abuse of discretion by the district court in revoking Maack's probation.

II. The Minnesota Drug Sentencing Reform Act does not apply to Maack's conviction.

Maack pleaded guilty to fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2(a)(1) (2014). At the time of the offense and plea, fifth-degree controlled-substance crime was a felony. *Id.* The legislature subsequently enacted the Minnesota Drug Sentencing Reform Act (the DSRA). *See* 2016 Minn. Laws ch. 160, §§ 1-22, at 576-92. Under the DSRA, Maack's conviction offense may be sentenced as a gross misdemeanor. *See* 2016 Minn. Laws ch. 160, § 7, at 583-85 (codified at Minn. Stat. § 152.025, subd. 4(a) (2016)).

The application of a statute is a question of law, which we review de novo. *State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016). As a general rule, "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2016). When a law is amended, "the new provisions shall be construed as effective only from the date when the amendment became effective." Minn. Stat. § 645.31 (2016).

In *State v. Coolidge*, the supreme court established an exception to this general rule, holding that "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." 282 N.W.2d 511, 514 (Minn. 1979). A judgment of conviction is final when direct appeals are exhausted or the time for filing a direct appeal has expired. *State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006).

Maack argues that the DSRA applies because her conviction was not final on the act's effective date. We are not persuaded. A stay of adjudication is a sentence that a defendant may appeal as of right. *State v. Allinder*, 746 N.W.2d 923, 924-26 (Minn. App. 2008); *see also* Minn. R. Crim. P. 28.05, subd. (1)(1) (stating an appeal must be filed within 90 days of the imposition of a stayed sentence). The district court imposed the stay of adjudication on December 8, 2015. Accordingly, Maack's time to appeal expired before the DSRA's August 1, 2016 effective date. 2016 Minn. Laws ch. 160, § 7, at 585; *see also Losh*, 721 N.W.2d at 894-95 (determining an appellant's conviction was final where she did not appeal within 90 days of the district court's imposition of a stay of adjudication). Because *Coolidge* does not apply, Maack is not entitled to have her conviction reduced to a gross misdemeanor.

Affirmed.