STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2025

State of Minnesota,
Respondent,

vs.

Cory L. Dieteman,
Appellant.

Filed July 17, 2017
Affirmed
Connolly, Judge

Wabasha County District Court
File No. 79-CR-10-874

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

James C. Nordstrom, Wabasha County Attorney, Karen Kelly, Assistant County Attorney, Wabasha, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

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

CONNOLLY, Judge

Appellant argues that the (1) district court abused its discretion when it revoked his probation because the evidence failed to show that the violation of the condition requiring that he attend treatment, or any such violation, was intentional or inexcusable or that the need for confinement outweighed the policies favoring probation; (2) state cannot condition a probationer's freedom on the requirement that he admit to committing past offenses for which he could still be charged; and (3) district court erred when it revoked appellant's probation for a violation that is inextricably linked to his failure to pass a polygraph examination. Because the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

In 2011, appellant Cory L. Dieteman was convicted of fourth-degree criminal sexual conduct after a jury trial. He was sentenced to 18 months in prison, which was stayed by the district court, and appellant was placed on supervised probation for ten years. The conditions of his probation included: (1) follow all instructions of probation; (2) attend a sex-offender treatment program; (3) have no contact with any persons under the age of 18 unless approved by a therapist and probation agent; and (4) submit to polygraph examinations and other testing as recommended by the treatment therapist. At the sentencing hearing, the district court ordered appellant to "enter into and successfully complete a Minnesota Department of Corrections approved sex offender treatment

program." The sentencing order states, "attend sex offender program." The district court never ordered the sex-offender treatment program to be completed by a specific date.

Appellant attended a sex-offender treatment program at Riverside Psychological Services through October 27, 2014, when he had surgery, and was terminated from the program in January 2015 when he did not return following the surgery. The discharge report stated that appellant "seemed resistant to the concept of treatment and tended to engage in an incredible amount of game playing or manipulation. While working on his sexual timeline and offense story [he] would frequently change his story, challenge anyone who would question his honesty and present in an argumentative manner." The discharge report also concluded that appellant had a tendency to deny or minimize the events of his offense story and never completed the details of his story to a point where a polygraph could be undertaken. He also reportedly "struggled with the concept of reporting triggers and red flags; which is an important step in understanding one[']s offense cycle and reducing the potential to reoffend." The discharge report states that appellant was terminated from the program for failure to progress in the program and excessive absences.

Appellant enrolled in another sex-offender treatment program (CORE) on April 28, 2015, but was discharged in March 2016. The discharge letter from CORE states that individuals in the program are expected to take their full-disclosure polygraph within six months of entering treatment. Appellant failed to do so and did not complete his sexual-history packet. Additionally, there were other concerns about appellant's behavior, including disruptiveness during group therapy, inappropriate comments, and text messaging during sessions. CORE indicated that it would be willing to continue working

with appellant, provided he (1) schedule an intake session; (2) complete a full disclosure polygraph; and (3) not use his phone during sessions.

On March 21, 2016, appellant took a sexual-history polygraph examination. The polygraph results indicated that appellant had been deceptive when responding "no" to the questions: "Prior to your conviction, as an adult, did you have sexual contact with any minor child that you have not told me about?"; "Prior to your conviction, did you ever force anyone to have sexual contact with you?" and "Prior to your conviction, did you have more sexual contact with your victims than you have told me about?"

In May 2016, appellant's probation officer discovered that (1) appellant had been married for nearly a year and never disclosed that information to probation or the treatment program; (2) there had been a minor child at appellant's wedding, a violation of his probation; and (3) appellant's wife was pregnant with their first child and the child was due in two to three months. Appellant was told that he would not be able to live with his wife and child until he passed a full-disclosure polygraph, reenrolled in sex-offender treatment, and made significant progress in that program. Appellant filed a motion in court to be allowed contact with the child, which was ultimately denied.

Appellant's child was born on June 27, 2016, and, despite his knowledge of the probation requirement that he move out of the residence, appellant continued to live with his wife and child. He attempted to satisfy the probation conditions by living in the apartment above the garage on the property. After being informed that this arrangement was not sufficient, he allegedly moved out for a time, but there were still reports that he and his wife and child were living together. Appellant then told his probation officer that

he wanted to move back to his house and indicated that his wife and child would be living with family in another town. His probation officer required that his wife and son's belongings be removed from the house. Appellant agreed, but when the probation agents visited appellant's house, they discovered that appellant had just moved his wife's and child's possessions into the attic. Appellant later removed the items from the home and was allowed to move in.

On September 7, 2016, appellant retook the polygraph examination. Appellant held his breath for prolonged periods and was manipulating his respiration during the portion of the exam when he was asked the questions for which the previous test had indicated deceit. He was asked multiple times to stop the behavior but failed to do so. Therefore, the examiners were not able to collect good quality responses to the relevant questions and were forced to call the exam "inconclusive." Appellant testified that he "didn't know what [he] was doing wrong" and that he would "take a deep breath, and then answer the question . . . that's what they say to do, and that's what [he] was doing."

On September 14, 2016, a probation-violation report was filed by the department of corrections and the probation officer made the decision to take appellant into custody. The report alleged a violation of probation because appellant failed to attend a sex-offender program and noted appellant's presence around a child at his wedding, the failure to report his marriage, and that appellant had been living with his child without permission from the courts. When appellant arrived for a scheduled appointment with the probation officer, the officer called law enforcement. Appellant, while waiting, asked if he could use the public restroom and was instructed to wait to talk to the probation officer. Appellant instead

walked across the street to the nearest available restroom inside the courthouse. The deputy arrived when appellant had crossed the street and the deputy and the probation officer observed him enter the courthouse. A short while later, he left the courthouse, crossed the street and got into his vehicle and drove away. The deputy then initiated a traffic stop to arrest appellant, who told the deputy he had diarrhea and was going to go home and call the probation officer when he arrived.

After a hearing, the district court revoked appellant's probation. The district court explicitly denied relying on the polygraph tests because "polygraph results are not recognized as evidence in Minnesota Courts." The district court found that appellant had exhibited a "significant pattern of manipulative behavior" which the court concluded was "designed to game the system." As evidence for the pattern of manipulative behavior, the district court cited that appellant (1) had been on probation for more than 76 months and was "still spinning his wheels" in treatment and has to now start over at square one; (2) claimed his wife was not living with him, yet her things were found just hidden in the attic for the probation officer's visit; (3) sensed he was going to be arrested and tried to evade arrest; (4) failed to tell his probation officer about his marriage and his wife's pregnancy, claiming that he did not understand he had to; and (5) took a photo with another child at his wedding and claimed he did not know he was not supposed to be with that child. The court specifically found that "[i]t doesn't find that there is any credibility to the defendant's behavior, his comments, his testimony, [or] his actions while on probation." The district court concluded that the three *Austin* factors were met, the failure to "[get] out of the blocks" in sex-offender treatment was inexcusable, and that the policy favoring

probation has been overcome by the need for incarceration because probation was founded on appellant receiving sex-offender treatment and appellant willfully "avoided and evaded that obligation." This appeal follows.

D E C I S I O N

"The [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). If the district court finds that a probation violation occurred, the district court may continue probation, impose intermediate sanctions, or revoke probation and execute a stayed sentence. Minn. Stat. § 609.14, subd. 3(2) (2016). The district court must apply the *Austin* factors before revoking a defendant's probation. *State v. Cottew*, 746 N.W.2d 632, 636-37 (Minn. 2008). These factors require the district court to "(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. Failure to address all three *Austin* factors requires a reversal and remand, even if the evidence was sufficient to support the revocation. *State v. Modtland*, 695 N.W.2d 602, 606-08 (Minn. 2005). "[C]ourts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608.

Appellant argues that the district court erred in revoking appellant's probation because (1) there was insufficient evidence to prove that he violated the condition requiring that he attend treatment, or that such a violation was intentional or inexcusable; (2) there

was insufficient evidence to prove that the need for confinement outweighed the policies favoring probation; (3) it conditioned appellant's freedom on the requirement that he take a polygraph; and (4) it revoked appellant's probation for a violation that is inextricably linked to his failure to pass a polygraph.

"It is well established that the results of polygraph tests, as well as evidence that a defendant took or refused to take such a test, are not admissible in Minnesota in either criminal or civil trials." *State v. Nowacki*, 880 N.W.2d 396, 399 (Minn. App. 2016) (quotation omitted). One reason that polygraph tests are not admitted is because they do not meet the *Frye-Mack* standards for reliability in order to be admissible as scientific evidence. *Id.* However, Minn. Stat. § 609.3456 (2016) permits the district court to order that a sexual offender submit to polygraph examinations as a condition of probation when the offender has received a stay of execution of a sentence.

Citing similar decisions in other jurisdictions, we have concluded that "the admission of polygraph test results as substantive evidence of a violation in probation-revocation proceedings is improper." *Id.* at 400. However, *Nowacki* explicitly stated that,

> because [Minn. Stat. § 609.3456] allows the use of polygraph testing as [a] condition of probation, evidence that an offender refused to take a polygraph would be admissible to prove a violation of such a condition of probation. This is distinct from the results of a polygraph being admitted as substantive evidence to prove that an offender violated other conditions of probation.

Id. at 401. Here, as in *Nowacki*, the references to the polygraph examinations are not admitted to show that appellant violated a condition of his probation that he submit to polygraph testing. Rather, as in *Nowacki*, "the references alluded to appellant's failed

polygraph tests, a factor that hindered appellant's progress in treatment. In other words, the admission of appellant's failed polygraph tests was used as substantive evidence of appellant's failure to complete treatment." *Id*. Because the use of the polygraph in revoking appellant's probation for failure to complete sex-offender treatment is similar to the violation in *Nowacki*, allowing references to appellant's failed polygraph tests to form the basis of his probation revocation would be in error.

However, *Nowacki* allows for probation revocation if the district court determines that there was a basis for the probation revocation apart from the violation based on the failure to complete a polygraph. *Id.* at 402. After specifically recognizing that a failure on a polygraph test was not being considered, the district court discussed a variety of other reasons appellant's probation should be revoked, including: (1) appellant exhibited a significant pattern of manipulative behavior; (2) despite sex-offender treatment being a key to probation, appellant went 67 months without making progress and hopes to "maybe get back into treatment and start over at square [one]." The district court revoked appellant's probation, not because he failed to take a polygraph test, but because he failed to get sex-offender treatment after over five and a half years of probation. We agree.

Appellant argues that he has been attending sexual-offender treatment and, because there was no date set for completing sex-offender treatment he has not violated the "attend sex offender treatment" condition of probation. However, the absence of a probation term that specifies a deadline for completing sex-offender treatment is not a bar to revoking probation, particularly when the district court determines that the probationer has not made any progress in sex-offender treatment. *See State v. Rock*, 380 N.W.2d 211, 212-13 (Minn.

App. 1986) (affirming a probation revocation when the evidence showed that a probationer was "not interested in trying to change" and was unwilling to participate in sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming a probation revocation when the evidence supported a district court's finding that a probationer was "unamenable to treatment").

Appellant also argues that the district court gave no analysis indicating that the violation was intentional and did not recite "specific reasons as to why the need for confinement outweighed the policies favoring probation." Failure to address all three *Austin* factors requires a reversal and remand, even if the evidence was sufficient to support the revocation. *Modtland*, 695 N.W.2d at 606-08.

The district court stated that the failure to even start sex-offender treatment after five and a half years of probation is inexcusable and that "the public policy favoring probation has been overcome . . . by the need for incarceration because this probation was founded . . . [on] sex offender treatment, and [appellant] willfully . . . avoided and evaded that obligation. He's tried to manipulate the system in a way that gives the appearance that he is cooperating [without] really cooperating." We conclude that this is an explicit finding that the violation was intentional and inexcusable because of the pattern of evasion appellant exhibited. Additionally, the district court stated that the need for confinement is strong when appellant failed to make any progress in sex-offender treatment, especially where, as here, the district court explicitly states that sex-offender treatment is a key to probation.

We conclude that the district court's explanation is sufficient to satisfy *Modtland* because it shows that "confinement is necessary to protect the public from further criminal activity by the offender" and that "[appellant] is in need of correctional treatment which can most effectively be provided if he is confined." *Id*. at 607. Because the probation revocation was supported by the three *Austin* factors, and because the district court did not improperly rely on appellant's failure to complete his polygraph tests, we conclude that the district court did not abuse its discretion.

Affirmed.