This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0499

State of Minnesota,
Respondent,

vs.

Samuel Wayne Behrens, Jr.,
Appellant.

Filed October 2, 2017
Reversed and remanded
Randall, Judge[*]

Benton County District Court
File No. 05-CR-13-594

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

Philip K. Miller, Benton County Attorney, Rebecca A. Hoffman, Assistant County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant County Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Randall, Judge.

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

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

RANDALL, Judge

In this probation revocation appeal, appellant argues that his revocation is invalid; claiming he received ineffective assistance of counsel. We reverse and remand.

FACTS

In early April 2013, appellant Samuel Wayne Behrens, Jr. was charged with first-degree criminal sexual conduct and second-degree criminal sexual conduct. In May 2013, Behrens pleaded guilty to the second-degree charge in exchange for dismissal of the first-degree charge and a stay of imposition, which included 25 years' probation. Conditions of Behrens' probation included completion of a sex-offender treatment program, individual counseling, and chemical dependency treatment. Behrens was also forbidden from accessing the internet without approval of his probation agent and from using monitoring software.

The district court held several probation-violation hearings over the course of Behrens' probation. On June 23, 2016, the district court held a probation-violation hearing regarding Behrens' use of electronic devices capable of accessing the internet. The district court dismissed the violation but amended Behrens' probation conditions to include no internet access and no possession of internet-capable devices without agent approval. The district court held another violation hearing on August 25, 2016, in which Behrens admitted to purchasing a phone capable of accessing the internet. As a consequence for this violation, the district court imposed a 36-month prison sentence, but stayed execution of that sentence and ordered Behrens to serve 120 days in jail.

Shortly after serving his jail time, Behrens appeared for a contested probation violation hearing in which the state alleged that Behrens had violated several terms of his probation, including accessing the internet without permission, consuming alcohol, possessing five cell phones capable of accessing the internet, failing to complete chemical dependency treatment, and failing to attend a chemical dependency treatment intake appointment. The state presented testimony from Behrens' probation agent. Behrens also testified at the hearing and admitted drinking, explaining that he had "a problem with alcohol or drugs." He also explained that he did not show up for intake due to work obligations, admitted his internet use but explained that it was only to obtain a college transcript, and admitted he had unapproved cell phones but explained that they were not in service and not used to access the internet. Following testimony, the state asked the court to find that the alleged violations had been proven by clear and convincing evidence. Behrens' attorney responded with the following:

> I don't know what to say for this man, Your Honor. He has been on probation a few years now. He probably should be farther along with things.
>
> I think given his disability and mental illness and untreated chemical addiction problems I don't think he is capable of being successful on probation.
>
> Every time I have talked with him in the past week or so since I have gotten this case he has been talking about going to treatment and wanting help for his alcohol problem and drug problem because he thinks that is sort of the overarching issue, but I know he wants to try one more time on probation, and that is what he is asking for, Your Honor.

The district court judge found the violations were proven by clear and convincing evidence and that they were intentional and inexcusable and asked the state to address potential sanctions. After the state provided a detailed history of violations, the state argued that it would depreciate the seriousness of those violations if the court did not revoke probation and execute the 36-month sentence. Behrens' attorney was asked to address sanctions and responded with, "Nothing further to say, Your Honor." The district court executed the previously stayed 36-month prison sentence. Behrens appeals.

D E C I S I O N

Behrens argues that his attorney provided ineffective assistance of counsel by failing to contest the violations at the revocation hearing and that he is entitled to a new revocation hearing with effective counsel. We agree.

A defendant has a statutory right to the assistance of counsel in a probation-revocation proceeding. Minn. Stat. §§ 611.14(3); 609.14, subd. 2 (2016). The parties have analyzed the issue under the Sixth Amendment. We follow that analysis. But s*ee Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 1763-64 (1973) (concluding that *Morrissey* applies to probation-revocation proceedings, but that the state has no constitutional duty to provide counsel in probation-revocation cases).

Ineffective assistance of counsel claims are mixed questions of law and fact and are evaluated de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). When evaluating claims of ineffective assistance of counsel under the Sixth Amendment, we employ the *Strickland* test, which has two prongs: deficiency of representation and prejudice to the defendant. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). "The defendant must

affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 695, 104 S. Ct. 2052, 2064, 2068 (1984)).

With respect to the first prong of *Strickland*, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Doppler*, 590 N.W.2d at 633 (quotation omitted). Behrens argues that his counsel's representation was unreasonable because counsel conceded that Behrens violated probation and that he could not be successful on probation. According to Behrens, "[n]o reasonably competent attorney would do such a thing."

The state does not even argue that Behrens' defense counsel's representation was objectively reasonable.

The state does not bother to address the first prong of *Strickland* but argues that Behrens is not entitled to relief because he "cannot meet the prejudice prong." *See Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (stating that "[a] court may address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other"). The state argues that there is no reasonable probability that the result of the proceeding would have been different, considering Behrens' detailed history of

probation violations and lack of meaningful progress while on probation. The state contends that it is unnecessary to decide whether counsel's representation was unreasonable, because Behrens cannot show that the result of the probation-revocation proceeding would have been different but for his counsel's representation. *See Gates*, 398 N.W.2d at 561-62.

We agree with Behrens that counsel's concession that Behrens could not be successful on probation was objectively unreasonable representation. We need only focus on the second prong of the *Strickland* test, prejudice to Behrens.

Behrens argues that, under the circumstances of this case, where counsel admits guilt in a probation revocation hearing without his client's consent, he is not required to demonstrate prejudice but is entitled to a new revocation hearing, regardless of whether his probation would have been revoked anyway. To support this argument, Behrens relies on *Dukes v. State*, where the supreme court acknowledged that "there are some Sixth Amendment right to counsel violations in which prejudice to the defendant will be presumed." 621 N.W.2d 246, 254 (Minn. 2001) (citing *Strickland* 466 U.S. at 692, 104 S. Ct. 2052). In *Dukes* the supreme court identified the situation "where counsel admits guilt without the consent of the defendant" as a situation in which the defendant would be "entitled to a new trial, regardless of whether he would have been convicted without the admission." *Id.* at 254 (citing *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (ordering a new trial after defense counsel merely implied defendant's guilt during cross-examination of the victim)).

Counsel's conduct in this case is close to a failure to subject the probation-revocation proceeding to "meaningful adversarial testing." *See State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011) (quoting *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984)). Behrens' counsel said, "I don't know what to say for this man, Your Honor. . . I don't think he is capable of being successful on probation." Behrens demanded a contested probation-revocation hearing, yet his counsel said nothing on his behalf except to admit that Behrens could not be successful on probation. As difficult as Behrens' case may be, he is entitled to a new probation violation hearing with new assigned counsel.

Reversed and remanded.