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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0770**

State of Minnesota,
Respondent,

vs.

David Martin Arth,
Appellant.

**Filed December 18, 2017
Affirmed
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-11-8857

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

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant David Arth challenges the revocation of his probation, arguing that the state failed to establish that (1) he violated a condition of probation, (2) any violations were

intentional or inexcusable, or (3) the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

In 2015, Arth was found guilty of 14 counts of possession of pornographic works involving minors. The district court sentenced Arth on all 14 counts. The sentences included prison terms of varying lengths, but all also included five years' conditional release. The sentences were set to run concurrently. The district court stayed all the sentences and placed Arth on probation for five years.

The district court conditioned Arth's probation on his complying with the "ten standard conditions of probation," which included the obligations to "sign releases of information as directed," "cooperate and be truthful with [his Probation] Agent in all matters," and engage in "[a]ny [p]rograms per Probation Officer . . . including any sex offender [programs]." At the time of sentencing, Arth was given a written list that included these conditions, but the court did not explain them on the record. The district court also conditioned probation on Arth's "register[ing] as a predatory offender for a minimum of ten years [and] comply[ing] with all of the [predatory-offender] registration requirements."

On August 11, 2016, Arth's probation officer filed a probation-violation report alleging that Arth had failed to "complete sex offender treatment as directed by Probation" and to "cooperate and be truthful with Probation as directed by the Court." At the violation hearing, the district court struck all the alleged violations because Arth was confused about the conditions of his probation and because the requirement that he cooperate with

probation had never been explained “to him specifically on the record.” The court then clarified several of the conditions to Arth:

You are to do whatever probation tells you to do. If you don't like it or you disagree with it, if you don't do it then it's a violation of probation. . . .

That includes that you have to be civil to them. It includes that you cannot speak inappropriately to them. And I understand that that can be subject to interpretation, but I will tell you this: You should only speak to them in the way that you would speak to the Court, all right? And if you were to speak to the Court in swearing words, in threatening words, in other words that could be misinterpreted, that would be considered a violation of the cooperation condition. . . .

He's ordered to sign any releases of information that probation wants him to sign or that the treatment facility wants him to sign. . . .

I'm going to direct [probation officers] to make sure that the forms are not blank forms, that any forms are . . . filled out to a specific agency or to a specific organization and they will have dates on them and they will have a place for Mr. Arth to sign. He will sign those releases of information whether he agrees with them or not. And if he doesn't sign them, that would be a violation of his probation.

On November 14, 2016, Arth's probation officer mailed him a predatory-offender-registration change-of-information form because Arth needed to update his address and employment information. The form was filled out with Arth's new address and employment information, but contained empty fields for information that did not need to be updated. It was also accompanied by a note from the probation officer asking him to sign and return the form. On November 27, Arth returned the form by mail, unsigned, to the probation officer.

Arth saw his probation officer on December 7 for a scheduled appointment at the Stillwater courthouse. When Arth arrived, he initially approached the probation officer in the unsecured area of the courthouse. The probation officer directed Arth to pass through the public-entrance metal detectors and meet her in the secured corrections-office area. Arth initially refused to obey these directions, instead following the probation officer toward the employees-only door. Only after being told three times to use the public entrance did Arth do so.

Once Arth was inside the secured area, the probation officer presented him with a release form to allow her to verify his new residence at a social-services facility in St. Paul. The form was specifically directed to the facility, contained an expiration date, and had a handwritten note from the probation officer specifying that the release was for information to “confirm residency and/or programming.” Despite several requests by the probation officer, Arth refused to sign the release. The probation officer then informed Arth that, if he did not sign the release, she would file a probation-violation report. At that point, Arth stood up, grabbed the release, and walked out of the office.

The probation officer followed Arth to the courthouse hallway and asked him to return the release form. Arth ignored her and continued walking toward the exit, at which point the probation officer waived a bailiff over to assist her. The bailiff stopped Arth, and the probation officer told him that she would give him a copy of the release form. Arth returned the original form to the probation officer, who made a copy and gave it to Arth. The probation officer then permitted him to leave. As Arth left, he called his probation officer a “b---h” and said probation staff was “all a bunch of f--king idiots.”

On January 10, 2017, Arth’s probation officer filed a probation-violation report on the grounds that Arth had failed to (1) “sign releases of information as ordered by the Court and Probation,” (2) “cooperate with the Predatory Offender Registration Requirements as ordered by the Court,” and (3) “cooperate with Probation in all aspects including being truthful, speaking respectfully, being civil, i.e. no swearing or threatening language.” The district court held a probation-violation hearing on February 17. The district court found Arth in violation of probation. It terminated Arth’s probation and executed his sentences. The district court acknowledged that, due to Arth’s custody credit, he would likely be processed out to conditional release immediately.

Arth appeals.

D E C I S I O N

The district court has broad discretion in determining whether there is sufficient evidence to revoke probation. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). We reverse a district court’s decision to revoke probation only for an abuse of discretion. *Id.*

When an offender violates a condition of probation, the district court may revoke probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subd. 3 (2016). Before revoking probation and executing the stayed sentence, the 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.” *Austin*, 295 N.W.2d at 250. The state must prove a probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(1); *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). “The decision

to revoke 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." *Austin*, 295 N.W.2d at 251 (quotations omitted).

Arth challenges the district court's findings on all three *Austin* factors.

I. Arth violated one or more conditions of probation.

Arth argues that his conduct did not violate any probation conditions imposed by the district court. He specifically asserts that swearing at his probation officer, refusing to sign the social-services-facility release form, and refusing to sign the predatory-offender-registration-update form are insufficient bases for a violation.

First, Arth challenges the finding that he violated the condition that he cooperate with probation because, although he swore at probation personnel, "those words could be deemed to be speech protected by the First Amendment." This argument ignores the fact that Arth did more than just swear. The district court based its finding of a violation not only on Arth's language, but also on the fact that he "walked away from the probation department[,] . . . terminat[ing] his interview with the probation department before it was terminated by them." Thus, we need not decide whether Arth's speech was protected; setting the speech aside, we conclude that sufficient evidence supports the district court's finding that Arth violated the condition of probation requiring him to cooperate with probation.

Second, Arth acknowledges that he did not sign the release form when asked to do so by his probation officer and did not sign the registration-update form. He argues that his probation conditions did not include a time frame for signing these forms. But the

district court ordered Arth to sign release forms “as directed” and to comply with predatory-offender-registration requirements. The probation officer directed Arth to sign the release, and he refused. The probation officer provided Arth with a registration-update form and asked him to sign it, and he sent it back unsigned. Sufficient evidence supports the district court’s findings that he violated the conditions of probation requiring him to sign releases and comply with registration requirements.

II. Arth’s probation violations were intentional and inexcusable.

Arth argues that the district court abused its discretion because his violations of the release-form condition and the registration-requirements condition were not intentional and inexcusable. Arth makes no argument that his violation of the cooperate-with-probation condition was not intentional or inexcusable.

Arth argues that his failure to sign the release form was unintentional and excusable because there was no deadline to sign the form. As discussed above, the condition required Arth to sign release forms “as directed,” and he was directed to sign the form. Arth also argues that he may have wanted to discuss this form with an attorney before signing it. But Arth conflates the release form with the predatory-offender-registration update form, as his justification for desiring attorney review is that “failure to complete the form accurately could lead to criminal prosecution.” Arth provides no argument as to why signing a release would subject him to criminal liability. Sufficient evidence supports the district court’s finding that violation of the release-form condition was intentional and inexcusable.

Arth also argues that his refusal to sign the predatory-offender-registration-update form was unintentional and excusable because “he may have wanted to discuss . . . the

predatory offender form with an attorney before signing an inaccurate predatory offender registration form.” The facts are inconsistent with this explanation. The probation officer mailed Arth the form on November 14, and, after holding on to it for 13 days, Arth mailed it back to her, unsigned, on November 27, with no indication that he was seeking attorney review. The district court did not abuse its discretion in rejecting Arth’s explanation and finding that he intentionally and inexcusably failed to sign the predatory-offender-registration update form.

III. The need for Arth’s confinement outweighs the policies favoring probation.

Arth argues that the district court abused its discretion in finding that the need for confinement outweighs the policies favoring probation because that finding was “reflexive” and did not adequately “ensure that Arth received rehabilitation or correctional supervision for the longest possible time.” In determining whether the need for confinement outweighs the policies favoring probation, the district court must find that:

- (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.

Austin, 295 N.W.2d at 251.

Arth argues the district court’s decision was reflexive because the court sought to “ma[k]e good on its promise to find him in violation if he refused to sign or placed qualifications on releases.” However, the record indicates that the district court properly considered the impact of allowing Arth to remain on probation. Discussing Arth’s refusal

to cooperate with probation, the district court stated that “we are unable to protect the public from [Arth’s] further criminal activity when he refuses to cooperate with probation,” observing that Arth was “an untreated sex offender” who “has never cooperated with the probation department in doing the therapy that was recommended.” The district court also found that it would unduly depreciate the seriousness of “all of the violations in this matter” if probation were not revoked. This was not a reflexive finding, nor was it an abuse of discretion.

Arth argues, however, that, because he has custody credit in excess of the length of his executed sentences, if the district court’s goal was to ensure that Arth completed sex-offender treatment or other rehabilitative goals, the district court should have kept Arth on probation, as that had the potential to maximize the length of time Arth would be under supervision. Specifically, Arth argues (and the state does not disagree) that the district court could have extended his probation for an additional three years, resulting in a total supervision period of eight years, whereas probation revocation results in Arth immediately being subject to conditional release, which will cease after five years, for a total of approximately seven years’ supervision.

Arth provides no authority for the proposition that a district court abuses its discretion by revoking probation in these circumstances. Furthermore, conditional release comes with the possibility of prison time if Arth fails to complete the necessary rehabilitative process. *See* Minn. Stat. § 609.3455, subd. 8(a)-(c) (2016) (providing that an offender may be sent to prison for failing to meet a condition of release, and listing successful treatment as a possible condition). Terminating probation thus creates an

incentive for Arth to successfully complete his rehabilitative treatment, which serves the interest of protecting the public from further criminal activity. In addition, conditional release counters the concern that continued probation would unduly depreciate the seriousness of Arth's violations. The district court did not abuse its discretion in determining that the third *Austin* factor was met even if probation revocation results in the immediate start of Arth's conditional release.

Affirmed.