STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0746

State of Minnesota,
Respondent,

vs.

Kelsey Anna Ballman,
Appellant.

Filed January 14, 2019
Affirmed
Bratvold, Judge

LeSueur County District Court
File No. 40-CR-12-1347

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Brent A. Christian, LeSueur County Attorney, Le Center, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges the district court's order revoking her probation and imposing an executed sentence, raising two issues: (1) appellant argues her guilty plea and sentence were invalid because the district court did not follow the parties' agreement concerning a

negotiated sentence and (2) appellant contends the district court abused its discretion in revoking her probation because the need for confinement did not outweigh the policies favoring continued probation. Because there is no authority allowing appellant to challenge her plea agreement in an appeal from a probation-revocation order, and the district court did not abuse its discretion in executing appellant's sentence, we affirm.

FACTS

In October 2012, appellant Kelsey Anna Ballman took her aunt's ring, which was valued at more than $1,000, and gave it to her boyfriend to pawn. After an investigation, the state charged Ballman with felony theft under Minn. Stat. § 609.52, subd. 2 (2012).

In March 2013, at an omnibus hearing, Ballman agreed to plead guilty to the charged offense in exchange for a stay of adjudication. She signed a written petition, which stated, among other things, that a stay of adjudication was "integral" to the plea agreement. During the hearing, Ballman's attorney also stated that a stay of adjudication was "integral to the negotiation" and added that probation was to be for "0 to 3 years." Ballman's attorney also stated that "we would first refer it for a pre-sentence investigation [(PSI)]," and Ballman would return for sentencing.

After waiving her trial rights, Ballman pleaded guilty and testified. Ballman stated that she understood the "deal" was a stay of adjudication and she would be placed on probation "for up to 3 years." Ballman also said she understood that she had a right to withdraw her guilty plea if the district court did not approve of the plea agreement and that she had a right to appeal. Finally, Ballman testified that she took the ring while in her aunt's home, without her aunt's permission, and that the ring was valued at more than $1,000.

The district court deferred acceptance of the plea and ordered a PSI. The PSI report recommended a stay of adjudication "to not exceed five years."

At the April 2013 sentencing hearing, Ballman's attorney stated that he and Ballman had read the PSI and had "no factual additions or corrections." Ballman's attorney moved "for sentencing pursuant to the [PSI] recommendations." The district court then stated that it would "sentence in . . . accordance with the PSI." The district court pronounced a stay of adjudication and placed Ballman on probation for a period "of up to 5 years," with several conditions, including no use of controlled substances, and no new offenses. Neither Ballman nor her attorney objected to the duration of the stay or the five-year probation term at any point during the sentencing hearing.

Probation filed two violation reports relating to Ballman. In January 2017, the first report alleged a violation for a check forgery offense from December 2016. At a hearing on the violation, Ballman pleaded guilty to the check forgery and admitted to violating her probation. The court accepted the guilty plea, vacated the stay of adjudication, pronounced a stay of imposition, and reinstated Ballman to probation on the same terms and conditions.

In October 2017, the second report alleged a total of six new misdemeanor convictions, including theft, theft by check, and driving after revocation. At a hearing on the violations, Ballman denied the allegations.

After continuing proceedings several times, a contested hearing was held in February 2018. The district court heard testimony from Ballman's probation officer regarding the six misdemeanor convictions from 2016 and 2017, Ballman's previous probation violation, and Ballman's positive results for the use of controlled substances on

four occasions, three of which occurred within the last month. The probation officer also testified that Ballman had refused three times in the last month to do an intake at an outpatient chemical dependency program. Ballman offered no evidence. The district court stated it would find Ballman in violation and asked to hear arguments for sentencing.

The state argued that Ballman was not amenable to probation and the court should impose and execute a sentence for 12 months plus one day. The state observed that the stay of Ballman's sentence would expire on April 16, 2018. Because Ballman had tested positive for THC on several occasions and refused intake for treatment at least three times, the state argued that "there is simply no rehabilitating Ms. Ballman."

In response, Ballman's attorney argued that Ballman should be reinstated on probation with residential treatment because Ballman had never had inpatient treatment. Both attorneys noted that Ballman was currently pregnant.

The district court stated that it would not consider Ballman's pregnancy "at all in this sentence." The court then outlined Ballman's probation violations, including that she failed to remain law abiding "on numerous occasions" and violated the "no use" probation condition at least four times since December 2017. Finally, the district court found that all of Ballman's probation violations were intentional and that the need for confinement outweighed the policies favoring probation. The district court then revoked Ballman's probation and imposed and executed a prison sentence for "a period of one year and a day."

Ballman appeals from the district court's order revoking probation. After filing this appeal, Ballman asked to stay this appeal for postconviction proceedings under Minn. R. Crim. P. 28.02, subd. 4(4), but this court denied the stay. The state did not file a brief and

this court directed the appeal to proceed under Minn. R. Civ. P. 142.03, which provides that "[i]f the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits."

D E C I S I O N

I. The validity of Ballman's 2013 plea agreement and sentence is not before us on appeal.

Ballman first argues that her 2013 sentence was invalid because the district court imposed "five years of probation rather than three" as discussed in plea negotiations. Because the district court revoked her probation after three years had passed, Ballman asks this court to vacate her conviction and her executed prison sentence. In short, Ballman appears to seek specific performance of the three-year probation term initially discussed in her 2013 plea negotiations. *See State v. Jumping Eagle*, 620 N.W.2d 42, 44 (Minn. 2000). The interpretation and enforcement of plea agreements are issues of law that we review de novo. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000).

This court must first determine whether Ballman's challenge to her guilty plea and initial 2013 sentence is properly raised in this appeal from a probation-revocation order. A defendant can challenge the validity of a plea agreement on direct appeal from a judgment of conviction or in a postconviction hearing. *Brown v. State*, 449 N.W.2d 180, 182-83 (Minn. 1989); *see also* Minn. R. Crim. P. 28.02, subd. 4(3); Minn. Stat. § 590.01, subd. 1 (2018).

Here, Ballman cites caselaw to establish that the district court "change[d] the terms of [her] plea agreement" when it imposed a five-year stay of adjudication. But all of the

cases cited are direct appeals from judgments of conviction. For example, in *State v. Kealy*, the appeal was from a judgment of conviction—not from an order revoking probation. 319 N.W.2d 25, 25 (Minn. 1982). Moreover, the appellant in *Kealy* "sought to withdraw his plea and stand trial" and filed a motion to that effect with the trial court. *Id.* at 26. The trial court imposed a stayed sentence "[o]ver the defendant's protest." *Id.*; *see also State v. Kortkamp*, 560 N.W.2d 93, 94 (Minn. App. 1997) (direct appeal from a judgment of conviction); *State v. Anyanwu*, 681 N.W.2d 411, 413 (Minn. App. 2004) (direct appeal from a judgment of conviction). None of these cases support Ballman's position that she may challenge her 2013 plea agreement and sentence for the first time on appeal from the district court's probation-revocation order.[1]

Ballman did not move to challenge her 2013 plea agreement and sentence in a direct appeal or a postconviction proceeding. There is no authority allowing Ballman to challenge her plea agreement and sentence in an appeal from a probation revocation. Therefore, the issue is not before us on appeal.

Ballman also requests that this court consider the validity of her 2013 sentence "as the interest of justice may require." *See* Minn. R. Civ. App. P. 103.04; *see also* Minn. R. Crim. P. 28.02, subd. 11 (providing the same standard). Generally, we are "most reluctant

[1] Ballman's counsel appeared to recognize this problem because Ballman moved to stay this appeal, stating that "there are issues which are more appropriately raised in a post-conviction proceeding and need to be addressed by the district court." One of these issues was "the voluntariness of [Ballman]'s plea." This court denied the stay request. Probation revocation appeals are governed by Minn. R. Crim. P. 28.05, and there is no provision in rule 28.05 that authorizes a stay and remand for postconviction proceedings. *See* Minn. R. Crim. P. 27.04, subd. 3(4)(b); 28.05, subd. 1(5).

to address issues that have not been raised at the lower courts." *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989). Ballman has not demonstrated good cause to persuade us to consider an issue for the first time on appeal. We therefore decline to review Ballman's plea agreement and sentence because she failed to raise the issue in a direct appeal from the original judgment of conviction or in a postconviction petition.

II. The district court's decision to revoke Ballman's probation was not an abuse of its discretion.

Ballman argues that she "substantially complied with probation for two years longer than she was supposed to," therefore, the need for confinement did not outweigh the policies favoring probation. "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). After a district court finds clear and convincing evidence of a probation violation, a district court has discretion to revoke probation and execute a sentence. Minn. R. Crim. P. 27.04, subds. 2(1), 3(2).

Before revoking probation, a district court must make findings that satisfy the three *Austin* factors. *See Austin*, 295 N.W.2d at 250. The district court must (1) specifically designate what conditions of probation were violated, (2) find that the violation was "intentional or inexcusable," and (3) "find that need for confinement outweighs the policies favoring probation." *Id.* If the district court decides to revoke probation and execute a sentence, the decision "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 (quotation omitted). Whether a district court has made findings required by the *Austin* factors is a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Ballman challenges only the third *Austin* factor—whether the need for confinement outweighed the policies favoring probation. In considering the third *Austin* factor, district courts should limit revoking probation to 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).

Here, the district court made specific findings on the third *Austin* factor. After outlining Ballman's numerous probation violations and finding that they were intentional, the district court stated:

> [T]he need for confinement outweighs the policies favoring probation at this point in time. I believe that confinement is necessary on Ms. Ballman's behalf, and to protect the public from criminal activity by this particular offender. Also, the offender, Ms. Ballman, is in need of correctional treatment which can most effectively be provided if she is confined. Probation would unduly depreciate the seriousness of all of these multiple violations and basically her thumbing her nose at probation . . . if the probation were not revoked.

Moreover, the court also stated during the hearing that Ballman "ha[d] indicated numerous times in the past that she doesn't want to do treatment."

We conclude that the district court did not abuse its discretion. The district court's reasoning captures all three of the situations where the public policies favoring probation

do not prohibit revocation. *See Cottew*, 746 N.W.2d at 636. First, the district court found that Ballman's confinement was necessary "to protect the public from criminal activity." Second, the district court found that Ballman was in "need of correctional treatment" that would be more effectively provided in prison. Third, the district court determined that reinstating Ballman to probation would depreciate the seriousness of Ballman's multiple probation violations. The district court's logical and thoughtful analysis was supported by the probation officer's testimony and was not an abuse of its discretion.

In sum, we affirm the district court's decision to revoke Ballman's probation and impose and execute Ballman's sentence.

Affirmed.