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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2122

State of Minnesota,
Respondent,

vs.

Nathan Gregory Beltz,
Appellant.

Filed August 26, 2019
Affirmed
Rodenberg, Judge

Blue Earth County District Court
File No. 07-CR-11-4247

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

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.[*]

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[*] 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

RODENBERG, Judge

Appellant Nathan Beltz appeals from an order revoking his probation and executing a previously stayed sentence. He argues that the district court's revocation determination must be reversed because the state failed to prove by clear and convincing evidence that he violated the terms of his probation. Alternatively, appellant argues that the need for confinement does not outweigh the policies favoring probation. We affirm.

FACTS

After pleading guilty to first-degree driving while impaired in 2012, the district court sentenced appellant to 48 months in prison, stayed for seven years during which appellant was to be on supervised probation. Probation conditions included that appellant attend and successfully complete the Blue Earth County Drug Court, abstain from the use of alcohol, abide by remote electronic alcohol monitoring (REAM), and obey all laws. Because appellant's driver's license was restricted, Minnesota law prohibited him from driving, operating, or being in physical control of any motor vehicle that is not equipped with a functioning ignition interlock device certified by the commissioner of public safety. Minn. Stat. § 171.09, subd. 1(g) (2016).

Appellant successfully completed drug court in September 2013. In June 2016, appellant admitted to consuming alcohol on two occasions in violation of his probation conditions. The district court reinstated probation with the additional condition that appellant have 90 days of electronic alcohol monitoring to verify that he was not drinking alcohol. Appellant was cited for driving a motor vehicle without ignition interlock on

November 10, 2016, and he pleaded guilty to a resulting misdemeanor offense. Appellant was also involved in a motor-vehicle collision in June 2017, registered a 0.07 alcohol concentration after the collision, and later pleaded guilty to a gross-misdemeanor offense for violating his driving restrictions.[1] Appellant admitted that this constituted a violation of his probation. The district court reinstated appellant to probation but ordered him to do 365 days of REAM, obtain and follow recommendations of a chemical-use evaluation, and attend sobriety support meetings.

Probation filed another violation report on September 7, 2017, alleging that appellant failed to submit to a required breath test on July 25, 2017, and, later that day, submitted a urine sample which tested positive for alcohol. The report also alleged that appellant failed to abide by REAM by twice failing to submit to alcohol testing. Additionally, the report cited the violations for driving without ignition interlock and violating his driving restrictions.

Because appellant missed several REAM tests, probation moved appellant's alcohol monitoring to a secure-continuous-remote-alcohol-monitoring (SCRAM) system, which provides for continuous transdermal alcohol testing through the use of an ankle bracelet. Appellant signed an acknowledgement identifying that he understood it was a violation to place anything between the SCRAM bracelet and his skin. In January 2018, probation filed an addendum to the September, 7, 2017 report, alleging that appellant tampered with the

[1] A person who drives, operates, or is in physical control of a motor vehicle in violation of the restrictions imposed in a restricted driver's license issued to that person, and the restriction relates to the possession or consumption of alcohol, or controlled substances, is guilty of a gross misdemeanor. Minn. Stat. § 171.09, subd. 1(f) (2016).

transdermal-testing bracelet. Before the probation-violation hearing was held, probation filed three more addenda to the September 2017 report, alleging additional violations for failure to abstain from alcohol and noncompliance with alcohol monitoring.

A contested probation-violation hearing was finally held on August 28, 2018.[2] The district court heard testimony from probation agent Sara Crocker and appellant, and received four exhibits, including urine-test results from Cordant Health Solutions, and registers of actions from the court files. It also received letters from Midwest Monitoring & Surveillance documenting tampering with, and alcohol presence detected by, the SCRAM bracelet.

Crocker testified to the alleged probation violations leading up to the filing of the September 7, 2017 probation report: (1) appellant admitted that, on June 29, 2016, he failed to abstain from alcohol; (2) on July 25, 2017 and August 3, 2017, appellant failed to abide by breath testing; (3) appellant provided urine samples on July 25, 2017, and August 14, 2017, that tested positive for alcohol; and (4) appellant had failed to abide by driver's-license conditions in June 2017. Crocker testified to additional violations that

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[2] Appellant notes that, in the time it took him to "obtain an attorney, remove a biased judge, and have a contested violation hearing, probation filed four addenda alleging new dates of confirmed or possible use and noncompliance with alcohol monitoring." The first addendum was filed in January, before any scheduled hearing. Appellant failed to appear at the probation-violation hearing scheduled for February 8, 2018. The hearing was rescheduled for March 6, 2018. Four days before the hearing, appellant filed a notice to remove the judge. A new judge was assigned on March 20, 2018. The district court granted appellant multiple continuances, one of which was to obtain an expert that appellant never obtained. The delay concerning which appellant comments in his brief was largely of his own making. More importantly, the delay did not result in any prejudice to appellant; he was able to remain on probation during the delay.

occurred after filing the September 7, 2017 report, including that appellant tampered with his SCRAM bracelet on seven occasions, failed to abstain from alcohol on six different days, and provided a urine sample that tested positive for alcohol.

Appellant objected to the introduction of the exhibits from Cordant Health and Midwest Monitoring on which Crocker's testimony was based. Crocker testified that she believes appellant is a danger to the community and should be committed to prison.

Appellant testified that he has been active in addressing his alcohol addiction. Appellant also testified that he owns a cleaning company and that the reports indicating alcohol in his system resulted from his exposure to cleaning chemicals. Cordant Health provided a letter accompanying the urine test that tested positive for alcohol, explaining that incidental exposure to ethyl alcohol may result in concentrations up to approximately 1,000 ng/mL of ethyl glucuronide (EtG) and 250 ng/mL of ethylsulfate (EtS), and that the levels shown in appellant's urine samples are "too high to be attributable to incidental exposure."[3] One of the tests indicates that appellant's EtG concentration was 47,024 ng/mL and the EtS was 7,422 ng/mL. Appellant attributed the SCRAM bracelet violations to his work boots and the tight fit around the top of his sock.

The district court found that appellant did not appear to challenge the validity of the alcohol-test results or the levels reported by Cordant, but rather, argued that the positive results are due to his incidental exposure to commercial cleaning chemicals. It determined

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[3] Cordant's letter explained that EtG and EtS are specific biomarkers for ethyl alcohol (alcohol) exposure. There are two types of exposure that could result in positive EtG and EtS results; voluntary consumption of alcohol-containing beverages, or incidental exposure to substances containing ethyl alcohol such as commercial cleaning agents.

that Crocker's testimony was credible, Cordant produced reliable test results, and the values reported for appellant's EtG and EtS levels are "well above any expected values due to exposure to cleaning chemicals." The district court concluded that appellant did not comply with required alcohol monitoring. It further found that the state proved the probation violations by clear and convincing evidence, and that the violations were intentional and inexcusable. Finally, it found that the need for confinement outweighs the policies favoring probation. The district court therefore revoked appellant's probation and sentenced him to 48 months in prison with 242 days credit for time served. It also imposed a five-year conditional-release period.

This appeal followed.

D E C I S I O N

Appellant argues that the state failed to prove that he violated the terms of his probation. In order to revoke probation, the state must prove a probation violation by clear and convincing evidence. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008).

The determination to revoke probation rests within the broad discretion of the district court, and a reviewing court will not reverse absent a clear abuse of that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). To revoke probation, a district court must (1) identify the specific conditions of probation that were violated, (2) find that those violations were intentional or inexcusable, and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). In making the three *Austin* findings, district courts "must seek to convey their

substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608.

Appellant claims that it was error for the district court to admit test results and letters from Cordant Health and summaries from Midwest Monitoring because they are hearsay evidence lacking demonstrated reliability. But the rules of evidence, other than those concerning privileges, do not apply to proceedings for revoking probation. Minn. R. Evid. 1101(b)(3).

Appellant argues that, under *State v. Johnson*, 679 N.W.2d 169 (Minn. App. 2004), hearsay statements must be necessary and reliable to be admissible without violating the accused's right to confrontation. We disagree with appellant's characterization of *Johnson*. There, we explained general Confrontation Clause principles and hearsay rules, but "conclude[d] that when the defendant has had ample opportunity to present evidence in a probation revocation proceeding, the rules of evidence do not preclude admission of hearsay evidence." 679 N.W.2d at 174. Here, appellant had a full and fair opportunity to present evidence and argue his position. Appellant also argues that *Johnson* requires that a defendant must be able to expose potential flaws in the disputed evidence through cross-examination. *Johnson* requires only that the defendant be afforded "the opportunity to present evidence [to ensure] that the defendant can expose potential flaws in the evidence." *Id.* Here, appellant was afforded that opportunity.

Appellant also argues that it was error for the district court to admit the laboratory results, summaries, and letters because they were based on scientific knowledge not possessed by any witness available for cross-examination, and the agent testifying did not

provide sufficient information to demonstrate the documents' reliability. Appellant cites *State v. Nowacki*, 880 N.W.2d 396, 400 (Minn. App. 2016), arguing that scientific test results that are not reliable are not admissible in probation-revocation proceedings. *Nowacki* is distinguishable. It held that evidence of a failed polygraph test was improperly admitted at a probation-revocation hearing. *Id.* The reasoning of *Nowacki*—that a probation violation must be proved by clear and convincing evidence, polygraph tests are inadmissible in court proceedings because they have not been proved reliable, and therefore, the results of an unreliable test cannot be clear and convincing evidence of a probation violation—indicates that its holding is limited. *Id.* The alcohol testing here is unlike a polygraph. Alcohol testing has been determined reliable and is consistently relied upon by courts. *E.g.*, *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134, 138 (Minn. App. 2009), *review denied* (Minn. Dec. 23, 2009).

At the revocation hearing, the district court stated that it "finds that the letters and summaries are sufficiently reliable to be admitted. I think it goes to weight." This is consistent with *Johnson*, which explains that "[t]he reliability of the hearsay evidence will be weighed against other evidence and the risk of relying on untrustworthy hearsay evidence will be greatly minimized." 679 N.W.2d at 174. We see no error in the district court's determination that the state proved appellant's probation violations by clear and convincing evidence.

Appellant also argues that the need for confinement does not outweigh the policies favoring probation. When addressing this *Austin* factor, district courts must consider that the purpose of probation is rehabilitation and that revocation should be a last resort.

Modtland, 695 N.W.2d at 600. The need for confinement outweighs the policies favoring probation if one of three subfactors is met: (1) confinement is necessary to protect the public from further criminal activity by the offender; (2) the offender is in need of correctional treatment which can be most effectively provided if confined; or (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Austin*, 295 N.W.2d at 251.

Concerning whether the need for confinement outweighs the policies favoring probation, the district court concluded that appellant is not amenable to continued probation and that his continued alcohol use, coupled with driving motor vehicles without ignition interlock, are serious public safety concerns.

Appellant argues that public safety concerns would be better addressed by requiring that he attend treatment. In *Austin*, the supreme court explained that "appellant has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed" and therefore determined that policy considerations required revocation. *Id.* Here, appellant has been offered and has undergone treatment, but he continues to use alcohol. This case is analogous to *Johnson* where the probationer was operating a vehicle after drinking alcoholic beverages, which was "precisely why Johnson was on probation" in the first place, and the supreme court concluded that the need for confinement outweighed the policies favoring probation. 679 N.W.2d at 177. Appellant repeatedly violated probation conditions directly related to why he was on probation. The district court was well within

its discretion in determining that the policies favoring revocation outweigh the policies favoring probation.

Affirmed.