STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1523

State of Minnesota,
Respondent,

vs.

Terry Izeal Heggs,
Appellant.

Filed June 15, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge

Olmsted County District Court
File Nos. 55-CR-16-7363, 55-CR-17-648, 55-CR-17-1914, 55-CR-17-4370

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

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

BRYAN, Judge

Appellant argues that the district court erred when it revoked his probation because it relied on conduct that was not identified as a specific probation violation in the notice of

violation. We conclude that the district court did not violate appellant's due process rights or abuse its discretion when it revoked his probation, and we affirm that portion of the district court's decision. Appellant also argues that the district court erred when it sentenced him because it counted two out-of-state convictions as equivalent to felonies in Minnesota. Because the state did not establish that the out-of-state convictions were equivalent to felonies in Minnesota, we reverse the calculation of appellant's criminal-history score and remand to the district court for further determination of this issue.

FACTS

Appellant Terry Izeal Heggs committed a series of criminal offenses between August 2016 and June 2017, resulting in charges in four different case files. Appellant pleaded guilty to charges in each of the four cases, including the following felony offenses: failure to register as a predatory offender (on two different cases); harassment within ten years of a conviction for a previous qualified domestic violence-related offense; and third-degree sale of methamphetamine. At the sentencing hearing in February 2018, the district court granted appellant's motion for a downward departure over the state's opposition, stayed imposition of sentence on all four cases, and placed appellant on probation for 20 years. The district court based this decision on appellant's acceptance into the Teen Challenge treatment programs, stating, "Teen Challenge, short-term and then long-term, is a year or more of a residential treatment program that you're either making progress in or you're not, and if you're not, you get kicked out, and then we know probation has failed." The district court also stated, "I wouldn't put you on probation if I didn't think I could send you to Teen Challenge for 12 to 13 to 14 months right now." The relevant terms of

probation included requirements that appellant comply with the following conditions: that he follow all state and federal criminal laws; that he maintain contact with his probation officer as directed; that he tell his probation officer about any contact with law enforcement within 72 hours of that contact; that he complete programming recommended by his probation officer; that he sign the probation agreement and follow all conditions set forth in the probation agreement; and that he "[e]nter into and successfully complete the short term Teen Challenge Treatment Program. After completion of the short term, apply for the Long Term Teen Challenge Treatment Program and successfully complete it."

On May 21, 2019, Dodge-Fillmore-Olmsted County Community Corrections filed a probation violation report. The report alleged the following five violations: (1) that appellant failed to follow all state and federal criminal laws because he had been charged with two misdemeanor offenses in Sweetwater County, Wyoming: driving without a valid license and providing a false name to a police officer; (2) that appellant failed to tell his probation officer within 72 hours about his May 14, 2019, arrest in Wyoming; (3) that appellant had been terminated from the Thinking for a Change classes due to nonattendance; (4) that appellant failed to meet with his probation officer on May 16, 2019, because he was in custody in Wyoming; and (5) that appellant left the state of Minnesota without notifying his parole officer and without prior approval. The report also described appellant's criminal history, including a prior conviction for second-degree assault and 55 separate misdemeanor convictions.

The report also indicated that appellant had initially struggled but had come to do quite well in the Teen Challenge programs. He even began taking on leadership positions

and was granted multiple travel permits over the year. However, the report indicated that appellant discharged himself from Teen Challenge "against staff advice" on February 22, 2019, approximately three weeks prior to successful completion of the program. The violation report did not specifically include failure to complete the Teen Challenge programs as a violation of probation. The report notes that probation staff decided not to bring this conduct as a violation because "it was determined that [appellant] would be given a chance in the community to prove that he had been learning the necessary tools in treatment to make positive life changes."

The first probation revocation hearing was held on June 17, 2019. At that hearing, appellant entered a denial to the five alleged probation violations. The district court continued the matter for a contested hearing. At the contested hearing on June 20, 2019, however, appellant admitted that he violated the terms of his probation, contesting only part of one of the five alleged violations. Specifically, appellant admitted that he failed to remain law abiding because he drove without a valid license in Wyoming. Appellant, however, contested the second part of the first violation: whether he provided the police officer with a false name. Appellant stated that, although he gave the officer an ID that used a different name, he told the officer his real name. Appellant also admitted the remaining violations: that he did not contact probation within 72 hours of his arrest; that he did not complete the Thinking for Change classes; that he missed the May 16, 2019 meeting with his probation officer; and that he left the state without prior approval from his probation officer. The district court found that these violations were intentional or

inexcusable and scheduled a third hearing regarding whether appellant provided the police officer with a false name and to determine the third *Austin* factor.[1]

The third hearing was held on June 27, 2019. At that hearing, the state withdrew the contested violation regarding whether appellant provided false information to a police officer. The state then proceeded to present evidence regarding the third *Austin* factor. Appellant's probation officer and appellant testified. The probation officer testified consistently with the probation violation report regarding appellant's unsuccessful discharge from the Teen Challenge programs. The probation officer testified that appellant had rejected his help and had rejected help from staff at Teen Challenge. The probation officer also testified that appellant left Teen Challenge against staff advice before completion of the programs. Finally, the probation officer also testified regarding the remaining violations, which appellant had previously admitted. Appellant contested the probation officer's testimony, stating that he did not leave Teen Challenge against staff advice, but with their approval. In addition, appellant testified that he had a lapse in his health insurance, that he only had one month to correct it, that he did not correct the problem in time, and that he left Teen Challenge when his insurance lapsed. Appellant believed he had completed the programs.

The district court credited the probation officer's testimony and concluded that appellant failed to successfully complete the Teen Challenge program:

[1] In *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), the Minnesota Supreme Court established that, to revoke probation, the district court must address three factors. In this case, the district court held a contested hearing regarding the third factor: whether the need for confinement outweighed the policies favoring probation.

> I don't think you successfully completed Teen Challenge. I just find incredible your account that just before you were about to successfully complete and be graduated, you were kind of given permission under some special circumstances under this Social Security card business to leave there, and that that was kind of tantamount to or quasi successful completion. That's not the information that was given to [the probation officer], and I just believe his account of how it all ended rather than your account. So you didn't do what was absolutely necessary in this probation.
>
> That's not to say you didn't make some progress. And I hope that what you learned at Teen Challenge short-term and some months in the long-term at some point does help you turn your life around. But I believe the State's version of what happened about the unsuccessful completion of Teen Challenge, and that was just flat inconsistent with what I was requiring of you as the absolute condition of probation.

The district court revoked appellant's probation based on the other admitted violations as well as its finding that appellant was unsuccessfully discharge from Teen Challenge, stating, "You left the state. You went to Vegas. You drove illegally . . . So based on those facts I find that probation has failed here, and . . . the policies that favor probation, that would otherwise favor probation, are outweighed by the need for incarceration."

The district court imposed an executed 45-month sentence on the third-degree drug count. The district court then pronounced concurrent sentences of 31 months, 26 months, and 26 months for the other three offenses. The controlling 45-month sentence was the presumptive sentence based on the sentencing guidelines worksheet, which assigned appellant a criminal-history score of four and one-half and included two convictions from Illinois. Appellant did not object to the district court's calculation at sentencing. The score

was rounded down to four under the Minnesota Sentencing Guidelines, leaving a presumptive sentence of 45 months.

Appellant challenges the district court's revocation of his probation and calculation of his criminal-history score.

D E C I S I O N

I. Revocation of Probation

Appellant argues that the district court violated his due-process rights and abused its discretion because the evidence presented was not sufficient to justify revocation of probation. We conclude that neither argument has merit.

A. Due Process

Revocations of probation deprive individuals of their liberty. *See State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82, 93 S. Ct. 1756, 1759 (1973)). As such, due process requires that a defendant be given notice of the alleged violations, an opportunity to contest those violations, and an opportunity to show that even if a condition of probation was violated, mitigating circumstances exist such that the violation does not warrant revocation. *See* Minn. Stat. § 609.14, subd. 2 (2018) (codifying requirements that probationers be notified in writing of the alleged violations and that probationers are entitled to a hearing on any alleged violations); Minn. R. Crim. P. 27.04 subds. 1-2 (requiring written notice of the allegations, the factual statements in support of the allegations, the rights to appointed counsel, a contested hearing, and appeal, among others); *see also, e.g.*, *Pearson v. State*, 241 N.W.2d 490, 492 (Minn. 1976) (noting procedural requirements for probation violation hearings).

A probationer must be "given written notice of the alleged grounds for revocation," but the notice need only be "adequate to warn the appellant of the issues that could come up at the hearing." *Austin*, 295 N.W.2d at 252 n.1. "When constitutional issues involving due process are raised, this court reviews the [district] court's legal conclusions de novo." *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

In this case, appellant argues that the district court violated his due-process rights when deciding whether to revoke his probation because it considered facts regarding his discharge from Teen Challenge, even though the written violations did not include a specific violation for failing to complete the Teen Challenge treatment programs. We disagree for three reasons. First, appellant did not raise this issue before the district court, and the issue is forfeited. *See State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015) (noting application of forfeiture doctrine to claimed due-process rights violation in probation revocation raised for first time on appeal).

Second, even assuming the issue was properly before this court, appellant's argument conflates allegations of probation violations with evidence regarding the balancing test that district courts must conduct when applying the third *Austin* factor. Notice of the alleged violations is distinct from evidence of the third *Austin* factor, which can include any of the following: conduct while on probation, chemical dependency and other treatment history, risk factors and assessments, current and past mental health, compliance with conditions of release or probation conditions in the past, and any other evidence relating to the need for confinement in a particular case. Appellant's legal

authority requires notice of the alleged violations, but does not relate to disclosure of evidence relating to the third *Austin* factor.

Third, appellant's argument is contrary to the facts in this case. Appellant argues that the district court determined that he "had violated a probation condition requiring him to complete Teen Challenge," that "this violation was not alleged or noticed," and that he was unaware that his treatment history "would be a focus of the hearing." None of these assertions has much factual support. Contrary to appellant's argument, the district court did not find that a probation violation occurred when appellant left the Teen Challenge treatment programs. Instead, the district court's findings were limited to the five violations noticed in the violation report.

In addition, contrary to the statements in appellant's brief, the violation report included abundant information regarding appellant's participation in the Teen Challenge treatment programs. For instance, the report indicated that appellant had initially struggled, but then performed quite well in the Teen Challenge programs, even taking on leadership positions and being granted multiple travel permits. The report also described the circumstances surrounding appellant's discharge from Teen Challenge, noting that it occurred "against staff advice" on February 22, 2019, approximately three weeks prior to successful completion of the program. The report also specifically explained why the probation officer did not include this as a separate enumerated violation: "it was determined that [appellant] would be given a chance in the community to prove that he had been learning the necessary tools in treatment to make positive life changes."

Finally, contrary to appellant's arguments, the district court's reasoning for granting appellant's requested departure in the first instance shows that appellant was made aware of how important his treatment history would be in any revocation hearing. At sentencing, the district court placed appellant on probation, noting that if "you get kicked out [of the Teen Challenge programs] . . . then we know probation has failed." The district court also stated that "I wouldn't put you on probation if I didn't think I could send you to Teen Challenge for 12 to 13 to 14 months right now." Therefore, we conclude that appellant's argument mischaracterizes the facts in this case and that the district court did not violate appellant's due-process rights.

B. Sufficiency of the Evidence

Appellant next challenges the district court's decision to revoke his probation, arguing that the evidence did not support the district court's determination that the need for confinement outweighed the policies in favor of probation. Because the district court did not abuse its discretion, we affirm the decision to revoke appellant's term of probation.

To revoke probation, a district court must address three requirements: (1) the district court must "designate the specific condition or conditions were violated," (2) it must "find that the violation was intentional or inexcusable," and (3) it must "find that need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. In making these findings, a district court is also required to provide substantive reasons for the revocation. *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). "The decision to revoke cannot be a reflexive reaction to an accumulation of technical violations," but instead should reflect a balance between the probationer's interest in

freedom and the state's interest in insuring his rehabilitation and the public safety. *Austin*, 295 N.W.2d at 251 (quotations omitted). District courts have broad deference to determine whether to revoke probation, *Austin*, 295 N.W.2d at 249-50, and we will not reverse absent a clear abuse of discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

In this case, appellant challenges the district court's determination of the third *Austin* factor. Appellant admitted five violations of the conditions of his probation, including committing a new offense when traveling out of the state without permission from his probation officer. In addition, the record shows that appellant was discharged from the Teen Challenge programs before completing them. Finally, the violation report discussed each of the four offenses for which appellant was placed on probation and his prior criminal record, including a conviction for second-degree assault and 55 prior misdemeanor convictions. Based on this record, the district court did not abuse its discretion when it determined that the need for confinement outweighed the policies in favor of probation.

II. Calculation of Criminal-History Score

Appellant argues that the district court erred in calculating his criminal-history score because it counted two Illinois offenses as equivalent to felonies in Minnesota.[2] Because the state did not establish that either offense would have constituted a felony in Minnesota, we remand to the district court.

[2] As a threshold issue, the state contends that this court lacks jurisdiction to hear this sentencing issue because it was not raised in the district court. This court previously addressed the state's argument, construing its motion to dismiss as a motion to strike and denying the motion in a January 9, 2020 order.

The sentencing guidelines "provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in the consideration of criminal history." *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001) (quotation omitted). Convictions from other jurisdictions must be considered in calculating a defendant's criminal-history score under the guidelines. *Id*.; *see also* Minn. Sent. Guidelines 2.B.5.a (2016). An out-of-state conviction may be counted as a felony in calculating a criminal-history score only if it would be defined as a felony in Minnesota "based on the elements of the prior non-Minnesota offense" and "the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b. (2016). "For prior non-Minnesota controlled substance convictions, the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense." Minn. Sent. Guidelines cmt. 2.B.503 (2016).

The state has the burden of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). "The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2016). This court reviews a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

When a defendant fails to object to the district court's calculation of his criminal-history score and the state's evidence was insufficient to carry its burden of proof as to the score, the proper remedy is to remand the matter for an opportunity for the state "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008); *see also, e.g.*, *Reece*, 625 N.W.2d at 826.

In this case, the only information about the two Illinois offenses comes from the sentencing worksheet and the presentencing investigation (PSI) report. The worksheet lists the offenses as "Possess Controlled Substance (IL)" and "Possess MJ w/ Intent to Deliver (IL)." The PSI reflects similar titles: "Possess Controlled Substance, cocaine" and "Possess w/Intent to Deliver Cannabis in School Zone." The PSI also indicates the respective sentences for each, noting: "2 years IDOC" and "1 year IDOC." Neither document identifies what the equivalent offense would be in Minnesota, and neither document includes the amount of controlled substances involved. There was no discussion of either Illinois conviction at the sentencing hearing, and no evidence submitted at sentencing regarding either offense. Given the circumstances here, we conclude that the state did not meet its burden of proof regarding appellant's criminal-history score, and we remand the matter to the district court.[3]

Affirmed in part, reversed in part, and remanded.

[3] Respondent concedes that "the common-sense remedy would be to simply remand the criminal-history score issue to the district court without ruling on the merits at this time."