STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1837

State of Minnesota,
Respondent,

vs.

Allen James Vandekieft,
Appellant.

Filed July 6, 2020
Affirmed
Bratvold, Judge

Nobles County District Court
File No. 53-CR-18-611

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

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge, Bratvold, Judge.

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

BRATVOLD, Judge

In this appeal from a probation revocation order, appellant argues that the district court abused its discretion by revoking probation and executing his sentence because this

is his first violation, his probation officer recommended reinstatement, and community-based treatment had not "even been attempted." Because the district court made detailed findings of fact, and the evidence supports those findings, we conclude that the district court did not abuse its discretion by finding that the need for confinement outweighed policies favoring probation. Thus, we affirm.

FACTS

In July 2018, the state charged appellant Allen James Vandekieft with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(g) (2014) (count one), and first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2014) (count two). At a hearing in October 2018, the parties reached a plea agreement. The state agreed to amend count one to second-degree criminal sexual conduct, under Minn. Stat. § 609.343, subd. 1(a) (2014) (sexual contact with complainant under 13 years while actor is more than 36 months older), and agreed to dismiss count two. The state also agreed to recommend a stayed sentence of 36 months, a "middle-of-the-box" sentence with no additional jail time. In exchange, Vandekieft agreed to enter a guilty plea under *Norgaard*.[1]

[1] *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867 (Minn. 1961), held that a district court may accept a guilty plea when a defendant testifies to memory loss by amnesia or intoxication. *See State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (citing *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970)). For a valid *Norgaard* plea, the record must show the defendant (1) has reviewed the evidence on the record and does not contest its accuracy, and (2) has no recollection of the events because of amnesia or intoxication. *Id.* The defendant also must acknowledge there is a substantial likelihood a jury would reach a guilty verdict based on the evidence, and the district court must find the plea was voluntary, knowing, and intelligent. *Id.* at 716-17.

After Vandekieft was placed under oath, the state offered the following summary of the evidence:

> [D]o you understand that if you went to trial the State's witnesses would testify basically to the following. [A sheriff deputy] learned that a 14-year-old girl . . . had been engaging in sexual intercourse with you. She -- she spoke to the victim and the victim reported having vaginal intercourse with you when she was eleven, and the victim reported that it happened multiple times here in Nobles County. Do you understand that's what the State's evidence would be?

Vandekieft agreed the summary was accurate and testified that he had no memory of the events because of intoxication. Vandekieft testified he had no reason to doubt the accuracy of the complaint or the police reports after having reviewed them. And, based on the complaint, Vandekieft was between age 18 and 21 when he had sexual contact with an 11-year-old girl. Vandekieft also testified and agreed that, based on the state's evidence, there was a "substantial likelihood" a jury would find him guilty of second-degree criminal sexual conduct beyond a reasonable doubt. The district court found Vandekieft's plea was voluntary, knowing, and intelligent, but deferred acceptance of the plea until sentencing.

About two months later, the district court accepted Vandekieft's guilty plea, adjudicated him guilty and imposed a sentence of 36 months, stayed for ten years, with 179 days of custody credit. As a condition of his stayed sentence, the district court ordered Vandekieft to comply with all terms and conditions of probation, including that he (1) "shall violate no laws of the State of Minnesota or elsewhere during the probationary period," (2) "follow each and all recommendations of the psychosexual evaluation," (3) "follow the recommendations of the chemical dependency assessment," and

(4) "register as a predatory offender in the State of Minnesota per statute." Before concluding the sentencing hearing, the district court had the following exchange with Vandekieft:

> THE COURT: Mr. Vandekieft, um, when [the state] was going through the recommendations of the psychosexual evaluation I couldn't help but notice you were shaking your head and didn't seem all too comfortable with those recommendations. It's extremely important that you understand those are not suggestions.
>
> VANDEKIEFT: I know.
>
> THE COURT: Those are requirements.
>
> VANDEKIEFT: Yep.
>
> THE COURT: And if you fail to abide by those requirements, um, your probation's gonna be violated. Those are central to your sentence. Um, they're not add-ons or afterthoughts. Um, you are in need of sex offender treatment and, uh, if you don't accept that and participate in that, your probation's gonna be violated.
>
> VANDEKIEFT: Yep.

About seven months after the sentencing hearing, probation filed a violation report with the district court alleging that Vandekieft had failed to (1) remain law-abiding, (2) comply with all recommendations of the psychosexual evaluation, (3) comply with all recommendations of the chemical-use assessment, and (4) register as a predatory offender. The violation report also stated that Vandekieft was "currently in custody at the Nobles County Jail" on new charges of failing to register as a predatory offender. After issuing a warrant, the district court held Vandekieft without bail and continued the revocation hearing so Vandekieft could confer with counsel.

At the next hearing, Vandekieft admitted the second violation because he failed to "enter group sex offender treatment" and "verify attendance at sober support groups." Vandekieft also admitted the third violation because he failed to "enter and complete out-patient chemical dependency treatment." Vandekieft told the district court that "it was a struggle out there," that he was "willing to try to do it again," and stated he knew where he "messed up." After finding that Vandekieft had intentionally committed violations two and three, the district court continued the matter for a contested hearing because Vandekieft denied violations one and four.

At a contested hearing one week later, the state called Vandekieft's probation agent, Shanell Schneider, who testified that she met with Vandekieft in person "at least five times." Schneider stated she "signed him up on the predatory offender registration" during their first meeting on January 2, 2019. Schneider also testified that Vandekieft is homeless and he would not provide any information about where he had been staying, so she visited him at his place of employment, a meat packing plant.

Schneider explained that, because Vandekieft is homeless, he must "check in" with local law enforcement each week to satisfy his predatory-offender registration requirements. In February 2019, Schneider met with Vandekieft at his work and learned he was noncompliant with predatory-offender registration requirements. When Schneider spoke with Vandekieft about failing to register, he stated, "I thought that this would happen." Schneider testified that she "continuously tried to explain to [Vandekieft] the seriousness of what could happen if he didn't check in weekly." Schneider also described

two more occurrences when Vandekieft acknowledged that he was not complying with predatory-offender registration requirements.

When asked if she knew why Vandekieft was neglecting to check in with law enforcement each week, Schneider testified "he told me that he hadn't been doing it because he's been busy at work." Schneider also testified that on May 22 Vandekieft told her that "he needed to keep a low profile, that he believed that there's people out in the community that wanted to either kill him or just wanted him dead . . . therefore he couldn't let anyone know, including myself, where he would be residing."

Schneider testified that she reported Vandekieft's noncompliance to the Worthington Police Department. The district court received a summary of her report as Exhibit 1, which stated that Vandekieft checked in with law enforcement twice during the seven months he was on probation (January 8, 2019, and February 22, 2019). On cross-examination, Schneider conceded Vandekieft had shown up for office appointments and had maintained his employment. Schneider agreed that her report recommended that the district court reinstate Vandekieft on probation. Schneider was the only witness to testify.

At the hearing, the district court found by clear and convincing evidence that Vandekieft had committed violations one and four because he had failed to remain law-abiding by not checking in with law enforcement as required by predatory-offender registration. The parties then argued about the appropriate disposition. The state argued that Vandekieft had lost the opportunity to remain in the community and avoid prison, and that public safety concerns supported execution of Vandekieft's sentence. Defense counsel

argued that this was Vandekieft's first probation violation, he was employed, and he attended scheduled meetings with probation. Defense counsel also stated that Vandekieft wanted to comply with conditions and asked the district court to reinstate him on probation.

After taking the matter under advisement, the district court revoked Vandekieft's probation and executed his stayed sentence in a written order. The district court found that Vandekieft had violated predatory-offender registration requirements by not checking in with law enforcement for portions of January and early February 2019, and then repeatedly failed to check in from late February through July. The district court also found that Vandekieft told probation on four separate occasions that he was noncompliant with his predatory-offender registration requirements. The district court found Vandekieft had been criminally charged with violating predatory-offender registration requirements. And the district court found that Vandekieft had not yet started either sex-offender treatment or chemical-dependency treatment, and that Vandekieft admitted he had attended no support group meetings.

The district court determined that Vandekieft had violated four conditions of probation because he had failed to remain law-abiding, to comply with all recommendations of the psychosexual evaluation, to comply with all recommendations of the chemical-use assessment, and to comply with predatory-offender registration. The district court found that his violations were intentional and inexcusable, the need for confinement outweighed probationary policies, Vandekieft's confinement was necessary for public safety, and treatment could be most effectively provided to Vandekieft while in

custody. Finally, the district court determined that not revoking probation would unduly depreciate the seriousness of the violations. Vandekieft appeals.

D E C I S I O N

A district court must make three findings before revoking probation: "1) designate the specific condition or conditions that were violated; 2) find that the violation was 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). These three findings are often called the "*Austin* factors." *See State v. Modtland*, 695 N.W.2d 602 (Minn. 2005); Minn. R. Crim. P. 27.04, subd. 3(3) ("If a contested revocation hearing is held, the court must make written findings of fact, including a summary of the evidence relied on in reaching a revocation decision and the basis for the court's decision.") "The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation," and we will only reverse "if there is a clear abuse of that discretion." *Austin*, 295 N.W.2d at 249-50. Whether the district court made the required findings to revoke probation is a question of law, which we review de novo. *Modtland*, 695 N.W.2d at 605.

On appeal, Vandekieft raises one issue: he contends the district court's order must be reversed because the record does not support revocation based on the third *Austin* factor. When addressing the third *Austin* factor, a district court "must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *Modtland*, 695 N.W.2d at 606-07 (quotation omitted).

Modtland adopted three sub-factors to aid district courts in making appropriate findings on the third *Austin* factor: (A) whether "confinement is necessary to protect the public from further criminal activity by the offender"; or (B) whether "the offender is in need of correctional treatment which can most effectively be provided if he is confined"; or (C) whether "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* (citations omitted). All three sub-factors need not favor confinement; only one is necessary. *See id.*; *Austin*, 295 N.W.2d at 250. We will discuss the district court's revocation decision given the parties' arguments on each sub-factor.

A. Public safety

The first *Modtland* sub-factor concerns whether an offender's confinement is necessary to protect the public from further criminal activity. *Modtland*, 695 N.W.2d at 607. Vandekieft is a predatory offender and lacks a primary address, so Minnesota law requires that he "report in person on a weekly basis to the law enforcement authority with jurisdiction in the area where [he] is staying." Minn. Stat. § 243.166, subd. 3a(e) (2018). Over a seven-month period, Vandekieft repeatedly violated his predatory-offender registration requirements—despite being reminded by his probation officer on at least five occasions. The state eventually charged Vandekieft for failing to register as a predatory offender and arrested him. On appeal, the state argues that Vandekieft's failure to register was an ongoing criminal offense and therefore confinement is necessary for public safety.

We agree with the state. Because the district court's determination on the first *Modtland* sub-factor is supported by the record evidence, we conclude that the district court

did not abuse its discretion in determining that confinement is necessary to protect the public from Vandekieft's continued criminal conduct.

B. Treatment effectively provided in confinement

The second *Modtland* sub-factor considers whether treatment can be most effectively provided in confinement. *Modtland*, 695 N.W.2d at 607. Vandekieft argues that the second sub-factor does not support revoking probation because community treatment had not yet failed, nor had it "even been attempted." Vandekieft also argues, relying on caselaw, that "[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *See* *Austin*, 295 N.W.2d at 250. Vandekieft claims he is willing and able to complete treatment in the community, and he has more than nine years to enter and complete treatment. Finally, Vandekieft argues the district court chose to "send him to prison under the false pretense that he could be more effectively treated in prison," despite "knowing that his [community] treatment options had not been exhausted."

The state argues that "the evidence in the record suggests exactly the opposite: that [Vandekieft] was not willing to complete treatment in the community." The state contends that Vandekieft made no effort to undergo community treatment, despite repeated attempts from probation to help him do so, and argues that Vandekieft's refusal to attempt treatment is a failure itself.

State v. Austin is instructive. There, appellant was offered community treatment but "failed to take advantage of the opportunity or to show a commitment to rehabilitation." 295 N.W.2d at 251. The supreme court affirmed the district court's decision to revoke

probation after determining "it was not unreasonable to conclude that treatment had failed." *Id.* This reasoning applies here because Vandekieft made *no* attempt at community treatment during his seven months on probation. *See also State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming revocation where probationer's "unwillingness to work with treatment programs" constituted a failure to complete sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *see generally State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation where probationer was terminated from treatment).

The probation violation report stated that probation tried to help Vandekieft enroll in and obtain financial support for community treatment; probation even delivered enrollment paperwork to Vandekieft's employer, but Vandekieft did not cooperate. Vandekieft had not participated in either chemical-dependency or sex-offender treatment, even though it was seven months after sentencing by the time the district court revoked his probation. Thus, the district court's conclusion, that treatment would be provided most effectively to Vandekieft in custody, is supported by the record. We conclude the district court did not abuse its discretion on the second *Modtland* sub-factor.

Even if we assume that community treatment had not failed because Vandekieft had not yet begun treatment, we would still affirm the district court's decision because only one *Modtland* sub-factor is required to revoke probation. *See Austin*, 295 N.W.2d at 251; *Modtland*, 695 N.W.2d at 606-07.

C. Seriousness of the violations

The third *Modtland* sub-factor contemplates whether "it would unduly depreciate the seriousness of the violation[s] if probation were not revoked." *Modtland,* 695 N.W.2d at 607. Both the sentencing guidelines and caselaw recognize that, when considering revocation, "[l]ess judicial tolerance is urged for offenders who were convicted of a more severe offense." Minn. Sent. Guidelines 3.B (2019); *see State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (employing same reasoning and upholding revocation).

Vandekieft was convicted of second-degree criminal sexual conduct for having repeated sexual contact with an 11-year-old girl when Vandekieft was 18 to 21 years old. The record supports the district court's finding that Vandekieft began violating probation shortly after sentencing. And the district court found that Vandekieft first told his probation officer he was noncompliant with registration as early as February 19, 2019, stating, "I thought this might happen." The district court found that probation met with Vandekieft at least three more times and reminded him of the predatory-offender registration requirements. The district court also found that Vandekieft told probation that he was unwilling to register and report because "he needs to keep a low profile" and "he doesn't trust anyone and when asked where he was residing he stated anywhere and everywhere." We conclude the record supports the district court's determination that "[n]ot revoking [Vandekieft's] probation would unduly depreciate the seriousness of the violations." Thus, we conclude that the district court did not abuse its discretion on the third *Modtland* sub-factor.

Vandekieft also complains that the district court's conclusions of law merely recited the factors from *Austin-Modtland*. It is correct that *Modtland* instructs district courts to do more than just recite the *Austin* factors and give "general, non-specific reasons for revocation." *Modtland,* 695 N.W.2d at 608. The supreme court adopted the three *Modtland* sub-factors to ensure that "district court judges will *create thorough, fact-specific records*" of the evidence relied on for the revocation. *Id.* (emphasis added); *see also* Minn. R. Crim. P. 27.04, subd. 3(3) (requiring district courts to summarize evidence that supports revocation). While it is best practice for a district court to explain its revocation decision in terms that do not merely recite *Modtland*, we are satisfied with the district court's decision because it includes detailed factual findings that relate to each of the *Modtland* sub-factors.

Affirmed.