STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0891

Donald Gordon Moore, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 28, 2020
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-10-42630

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jordan W. Rude, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

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

REILLY, Judge

Appellant challenges the district court's denial of his petition for postconviction relief. Because the district court did not abuse its discretion when it revoked appellant's probation, we affirm.

FACTS

In September 2010, respondent State of Minnesota charged appellant Donald Gordon Moore with two counts of first-degree criminal sexual conduct for touching the bare vagina of the victim, a four-year-old girl. In January 2011, appellant entered a plea of guilty to one count of criminal sexual conduct and the state dismissed the second charge. During the factual-basis portion of the plea, appellant admitted that he touched the victim's vagina with his hand on 5-10 occasions for the purpose of sexual gratification. The district court sentenced appellant to 144 months in prison, stayed for 10 years. As a condition of his probation, the district court required appellant to "enter and successfully complete a sex offender-specific treatment program and aftercare as directed and approved by [his] supervising probation officer." The district court also prohibited appellant from using alcohol or non-prescribed mood-altering drugs.

Appellant entered outpatient sex-offender treatment at Alpha Human Services (Alpha) in March 2011. In July 2016, probation filed a violation report alleging that appellant committed two probation violations by failing to remain law-abiding and by failing to abstain from alcohol. Alpha discharged appellant from sex-offender treatment two weeks later. In August 2016, probation filed an addendum to the probation violation

report adding two new violations for failing to successfully complete court-ordered sex-offender treatment and for failing to inform probation of his significant relationships.

In October 2016, the state sought to revoke appellant's probation. The district court held a probation-violation hearing, at which appellant admitted to all four violations. The district court determined that appellant violated probation and ordered him to serve 365 days in jail, complete chemical-dependency treatment, and continue probation under the same terms and conditions. Alpha agreed to take appellant back into the program at a higher level of care. In 2017, the district court issued an amended sentence releasing appellant from jail with instructions to turn himself in to Alpha.

In February 2018, probation filed a second violation report alleging that appellant failed to successfully complete sex-offender treatment at Alpha. Alpha terminated appellant from the treatment program because of his "failure to make adequate progress." Appellant's probation officer recommended that the district court revoke appellant's stay and execute his sentence.

The district court held a revocation hearing in July 2018. Appellant's probation officer testified that appellant violated his condition to successfully complete sex-offender treatment. The probation officer described appellant's progress in treatment as "painfully slow," and noted that he continued to blame others for his sexual offenses. The probation officer testified that appellant "struggled to make any progress" after he returned to Alpha following the first revocation hearing, and refused to complete his assignments in treatment. The probation officer testified that, in her professional opinion, appellant was not amenable to treatment in the community.

Appellant called a witness to testify that he was an appropriate candidate for treatment in the community. After Alpha terminated appellant, Skipped Parts LLC completed a risk assessment for him. Skipped Parts is a private practice that operates on an outpatient basis and provides assessments for adults who have engaged in sexual-offending behavior. One of the owners of Skipped Parts testified that she completed a risk assessment on appellant and believed he was at a low- to moderate-level risk of reoffending.

Following the hearing, the district court vacated appellant's stay of execution and committed him to the commissioner of corrections for the rest of his sentence. The district court determined that appellant violated the conditions of his probation, that his violations were intentional and inexcusable, and that the need for confinement outweighed the policies favoring probation. Appellant filed a motion for a downward durational departure. The district court denied the motion, keeping in place the 144-month prison sentence.

In January 2020, appellant filed a postconviction petition arguing that the district court abused its discretion by revoking probation and executing his prison sentence. The district court denied the petition and held that appellant's claims were procedurally barred and failed on the merits.

This appeal follows.

D E C I S I O N

Minnesota's postconviction statute allows a person convicted of a crime to petition the court for relief when the sentence "violate[s] the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1 (2018). A district

court must grant a hearing on a petition for postconviction relief "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2018). We review the denial of a petition for postconviction relief for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record, or exercises its discretion in an arbitrary or capricious manner." *Crow v. State*, 923 N.W.2d 2, 9 (Minn. 2019) (quotation omitted).

Appellant argues that the district court abused its discretion by revoking probation. Before revoking probation, 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." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id*. "The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation," and we will reverse only "if there is a clear abuse of that discretion." *Id*. at 249-50. Whether the district court made the required findings to revoke probation is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Here, appellant does not challenge the first *Austin* factor and concedes that the district court properly designated the specific conditions that appellant violated. Appellant challenges only the second and third *Austin*-factor findings, arguing that his violations were

not intentional or inexcusable, and the need to confine him does not outweigh the policies favoring probation.

I. Appellant's probation violations were intentional and inexcusable.

Appellant argues that the record does not support the district court's finding that the violations were intentional and inexcusable under the second *Austin* factor. We disagree. The district court determined that appellant "failed to complete his assignments." The district court noted that "[appellant] clearly did not want to be in residential treatment, so he declined to participate in the treatment. Even after [being] warned he would be terminated if he failed to make progress, [he] continued his refusal to do the treatment work."

The record supports the district court's determination. The district court made its findings in the context of appellant's probation violations. Probation filed the first violation report in July 2016, alleging that appellant failed to remain law-abiding and abstain from alcohol. Alpha discharged appellant from treatment two weeks later due to the "lack of insight and significant thinking errors" displayed by these violations. Probation later filed an addendum to the probation violation report, adding two new violations for failing to successfully complete court-ordered sex-offender treatment and for failing to inform probation of his significant relationships. Appellant admitted to all four violations, and Alpha agreed to take appellant back into the program at a higher level of care. In February 2018, probation filed a second violation report alleging that appellant failed to successfully complete sex-offender treatment. Alpha terminated appellant from

sex-offender treatment a second time for failing to "make adequate progress." Appellant failed to successfully complete his treatment as of the second probation violation hearing.

Appellant argues that the district court improperly relied on hearsay evidence because the probation officer testified about statements appellant made to Alpha's staff. But the rules of evidence do not preclude the admission of hearsay evidence in probation revocation proceedings. Minn. R. Evid. 1101(b)(3). "[W]hen 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." *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004). "Affording the defendant the opportunity to present evidence ensures that the defendant can expose potential flaws in the evidence." *Id*. Thus, "[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." *Id*.

Here, appellant had a chance to present evidence and cross-examine the state's witnesses, including his probation officer. Appellant also called a witness from Skipped Parts to testify that he was at a low- to moderate-level risk of reoffending, to counter his probation officer's testimony. The district court found the probation officer more credible than appellant's witness, based on Alpha's method of scoring and Alpha's "extensive work" with appellant. We defer to these credibility findings. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (recognizing that "credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder" and district court's credibility determinations are "accord[ed] great deference" (quotation omitted)). We conclude that the district court did not improperly consider hearsay testimony.

Appellant also argues that his violations were not intentional or inexcusable because he was making progress in treatment. This argument is not persuasive. The district court ordered appellant to complete treatment, not merely to attend treatment. And we have previously affirmed the revocation of probation based on a probationer's failure to complete the required treatment program. *See State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming revocation when probationer failed to complete sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation when probationer was discharged from one treatment program and not accepted into another).

The probation officer testified that appellant failed to complete even the first part of Alpha's treatment regimen in over six months in the program. The district court received evidence from Alpha that appellant's "avoidance in making the changes necessary to live as a safe member of society [is] also problematic and [has] made it exceptionally difficult for Alpha's staff to treat him." The probation officer stated that in her expert opinion, appellant remained a risk to the community and was not a suitable candidate for probationary treatment. The district court found the witness's testimony credible, and we defer to those credibility determinations. We conclude that the district court did not abuse its discretion by determining that appellant intentionally and inexcusably failed to complete treatment.

II. The need for confinement outweighs the policies favoring probation.

The district court determined that the need for confinement outweighed the policies favoring probation under the third *Austin* factor. When evaluating this factor, the district

court must "balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Modtland*, 695 N.W.2d at 607 (quotation omitted). The district court considers whether "(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." *Id*. (quotation omitted). Only one subfactor is necessary to support revocation. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (recognizing that "we normally interpret the conjunction 'or' as disjunctive rather than conjunctive"). The district court found that all three subfactors supported revocation. The record supports these findings.

As for the first subfactor, appellant's confinement is necessary to protect the public from further criminal activity by appellant. Appellant's probation officer stated in the 2018 violation report that "[a]s an untreated sex offender, this defendant is a risk to public safety." The probation officer testified at the hearing that she was "concerned about public safety" and appellant's risk of reoffending because he "lacks so much insight into his own arousal pattern [and] sexual interest." The district court credited this evidence, and we defer to those credibility determinations. The record supports the district court's finding that confinement is necessary to protect the public.

As for the second subfactor, the record establishes that appellant needs correctional treatment. Appellant had multiple opportunities to complete programming in outpatient and inpatient settings at Alpha. Alpha discharged appellant twice for his refusal to participate in treatment. The probation officer testified that she did not believe appellant

was amenable to treatment in the community: "after the attempts were made for many, many years in an outpatient treatment program, and then he was given [a] subsequent opportunity to do the highest level of care, which would be in a residential program, that was unsuccessful." And while Skipped Parts was willing to work with appellant, the district court noted that Skipped Parts "is not a correction treatment program." The record supports the district court's finding that appellant failed to succeed in treatment in the community, and that confinement is necessary.

As for the third subfactor, declining to revoke probation would unduly depreciate the seriousness of appellant's violations. The state afforded appellant "two distinct chances to complete the one affirmative requirement of his probation" in the community. After his first violation report in 2016, the district court warned appellant that he had one "last chance" to complete his sex-offender treatment at a higher level of care in a residential setting. Appellant did not complete his treatment with Alpha and was terminated from the program in 2018 for failing to make progress. Appellant argues that the district court could have imposed other alternatives to executing the sentence, such as local jail time or community supervision, to convey the seriousness of the violation. But the district court did not have to provide appellant with additional opportunities to seek outpatient treatment before revoking his probation. *See State v. Osborne*, 732 N.W.2d 249, 255-56 (Minn. 2007) (concluding that district court did not abuse its discretion by revoking defendant's probation without allowing defendant to seek more probationary resources).

The district court determined that the need for confinement outweighs the policies favoring probation under the third *Austin* factor. Because sufficient evidence in the record

supports the district court's factual findings, we conclude that the district court did not abuse its discretion when it revoked appellant's probation and executed his sentence. As a result, the district court did not abuse its discretion by denying his petition for postconviction relief on the merits.[1]

Affirmed.

[1] Because we conclude that the district court did not abuse its discretion by denying the petition on the merits, we do not reach appellant's argument that his petition was proper under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976).