STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1605

State of Minnesota,
Respondent,

vs.

Andrew Paul Holm,
Appellant.

Filed June 21, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge

Faribault County District Court
File No. 22-CR-19-474

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

Kathryn M. Karjala-Curtis, Faribault County Attorney, Blue Earth, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this appeal from an order revoking his probation, appellant argues that the district court abused its discretion by failing to make adequate findings to support revocation. Appellant also asserts he is entitled to resentencing based on amendments to the Minnesota

Sentencing Guidelines that affect his criminal-history score. We affirm the revocation of appellant's probation but reverse and remand his sentence to the district court for resentencing in light of the amendments to the guidelines.

FACTS

On July 25, 2019, appellant Paul Andrew Holm, while driving a pickup truck, struck and severely injured a motorcyclist. Although appellant was originally charged with being under the influence of drugs or alcohol, he pleaded guilty to an amended charge of criminal vehicular operation causing great bodily harm through gross negligence (speeding and inattentive driving) in violation of Minn. Stat. § 609.2113, subd. 1(1) (2018). At the time of the plea, appellant was already on probation for gross misdemeanor third-degree driving while impaired/test refusal. The district court sentenced appellant to 51 months, based on a criminal-history score of eight, and stayed the sentence on the condition that, among other things, appellant serve 270 days in jail, make restitution, and remain law abiding. This sentence was a downward dispositional departure from the guidelines sentence.

On May 6, 2020, a sheriff's deputy stopped appellant, who was driving despite having his license cancelled as inimical to public safety. During the ensuing incident, appellant left the scene, fought with officers, and spit on one officer. Appellant was charged with felony and gross misdemeanor assault, obstruction of legal process, and misdemeanor fleeing a peace officer.

The Department of Corrections filed a probation-violation report on July 22, 2020. The probation-violation report alleged multiple violations of the probation conditions including (1) failure to abstain from drug/alcohol use; (2) refusal to submit to chemical

testing; (3) failure to pay restitution; and (4) failure to remain law abiding, based on the new charges from May 6. The probation officer who prepared the report concluded that appellant was "unamenable to supervision" and "a risk to public safety." The probation officer noted that appellant had been given a downward dispositional departure but he "has never successfully completed a probation or supervised release term" and "[p]rior rehabilitation efforts have failed and . . . there are no alternatives to revocation that would protect public safety." Finally, the probation officer opined that "the need for confinement outweighs the policies favoring probation because confinement is necessary to protect the public from further criminal activity and it would unduly depreciate the seriousness of the violation if probation were not revoked."

After a revocation hearing, the district court found that appellant "violated clearly established conditions of probation," and that the violations were intentional and inexcusable. The district court concluded that the policies favoring probation were outweighed by the need for confinement and executed the stayed 51-month sentence. This appeal follows.

DECISION

I. The district court's findings were adequate to sustain its probation-revocation decision.

We review the district court's revocation decision for an abuse of discretion. *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2005), *aff'd on other grounds*, 883 N.W.2d 790 (Minn. 2016). The district court is required to support its decision with adequate

findings; whether it has done so is a question of law subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

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 the need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The district court must make adequate, fact-specific findings to enable review, and may not rely on a general recitation of the *Austin* factors. *Modtland*, 695 N.W.2d at 607-08. In addressing the third *Austin* factor, the district court should consider the original offense and the intervening conduct that serves as a basis for revocation, and determine if "confinement is necessary to protect the public from further criminal activity;" "the offender is in need of correctional treatment [that] can most effectively be provided if he is confined;" or "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 607. Appellant argues that the district court's findings in support of the third *Austin* factor are inadequate, and, therefore, the decision to execute his stayed sentence was an abuse of discretion.

Specifically addressing the third *Austin* factor, the district court here focused on "a combination of the original charges [appellant] was convicted of and [his] intervening conduct." The district court noted that with his criminal-history score, he should have been sentenced to prison, but he was "given the opportunity . . . to demonstrate . . . that [he] could survive in society without going to prison" and was sentenced to a downward dispositional departure. Instead of taking advantage of the opportunity, the district court

found that he "engaged in conduct that demonstrates that [he] pose[s] a risk of harm to the public," including driving after taking methamphetamine, fighting with the police, spitting on one officer, and threatening another. The district court added that appellant engaged in the conduct between staggered jail sentences, suggesting that appellant needs correctional treatment, which is available only if he is confined. The district court found that appellant was unamenable to probation and that appellant had never successfully completed a probationary term. Finally, the court concluded that it "is compelled in view of all these facts and circumstances to find that it would unduly depreciate the seriousness of the violations if [appellant's] probation [was] not revoked."

In *Fleming*, the district court considered, when analyzing the third *Austin* factor, that Fleming had received a downward dispositional departure. 869 N.W.2d at 331. This court described this as "a proper consideration." *Id.* Like Fleming, appellant here had been given an opportunity to prove that he could remain law abiding while on probation. At the sentencing hearing, appellant had assured the district court that he intended to seek chemical-dependency treatment and "stay away from all the negativity." There is no indication that appellant did so. During his revocation hearing, Fleming had also urged the district court to consider alternative dispositions, including chemical-dependency treatment. *Id.* But this court affirmed the district court's decision not to consider such alternatives when Fleming did not identify available placements in the probation-revocation hearing. *Id.* at 331. Appellant did not suggest viable and concrete alternatives to revocation of the sentence. And, like Fleming, appellant has an extensive history of second chances that he has failed to use.

The district court's findings on the third *Austin* factor are adequate to sustain its revocation decision.

II. Appellant's sentence must be remanded for correction due to amendments to the Minnesota Sentencing Guidelines.

"The court may at any time correct a sentence that is not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. A sentence based on an incorrect criminal-history score is illegal and, therefore, unauthorized. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). A defendant cannot forfeit review of his criminal-history score. *Id.* at 148. We review interpretations of the sentencing guidelines as a question of law subject to de novo review. *State v. Scovel*, 916 N.W.2d 550, 555 (Minn. 2018). Appellant argues that his criminal-history score was improperly calculated due to amendments to the Minnesota Sentencing Guidelines that became effective on August 1, 2019.

The Minnesota Sentencing Guidelines Commission is required to submit modifications to the guidelines by January 15 of each calendar year. Minn. Stat. § 244.09, subd. 11 (2020). Each modification takes effect on August 1 of that calendar year unless the legislature "by law provides otherwise." *Id.* The commission made various modifications to the guidelines in 2019; because there was no legislative action, these modifications became effective on August 1, 2019.

A. Misdemeanor/Gross-misdemeanor units

Before August 1, 2019, targeted misdemeanors and gross misdemeanors each received one unit for purposes of calculating a criminal-history score; four such units equaled one criminal-history point. Minn. Sent. Guidelines 2.B.3.a (2018). But a

misdemeanor or gross-misdemeanor conviction was subject to a decay factor; if more than 10 years had elapsed between discharge from or expiration of the sentence and the commission of the new offense, the conviction could not be counted as a unit. Minn. Sent. Guidelines 2.B.3.e (2018). In the August 1, 2019 amendments to the guidelines, the decay factor was changed so that a conviction could not be used as a unit if there was more than ten years between the initial sentencing for the earlier conviction and the date of the new offense. Minn. Sent. Guidelines 2.B.3.e (Supp. 2019).

The probation department gave appellant one unit for a gross-misdemeanor escape conviction for which he was sentenced on January 22, 2009. Because the new offense occurred on July 25, 2019, the earlier sentence had decayed under the amended guidelines; under the previous guidelines, the unit would have been counted because his sentence was not discharged until December 7, 2009. No partial points are given for fewer than four units. Minn. Sent. Guidelines 2.B.3 (Supp. 2019). Because of the decayed conviction, appellant had only three units. Therefore, appellant should not have been assigned a point for prior-misdemeanor and gross-misdemeanor offenses.

B. Custody-status point

Before August 1, 2019, one point was added to a defendant's criminal-history score if, at the time the current offense was committed, he was under one of several custody statuses following a guilty plea, verdict, or conviction for a felony or other enumerated offenses including a gross-misdemeanor driving-while-impaired offense. Minn. Sent. Guidelines 2.B.2.a (1)-(3) (2018). This guideline was amended effective August 1, 2019, so that one point was added if the defendant was on parole or supervised release, but only

one-half point was added if the defendant was on one of the other custody statuses, including probation. Minn. Sent. Guidelines 2.B.2.a (1)-(3) (Supp. 2019). At the time he committed the current offense, appellant was on probation from an earlier offense and, therefore, only one-half point for custody status should have been added to his criminal-history score. The probation office gave appellant one custody-status point. Appellant is entitled to resentencing under the 2019 guidelines for a reduced custody-status score of one-half point.

"The amelioration doctrine requires that a law that mitigates punishment be applied to acts committed before the law's effective date, so long as no final judgment has been reached and the legislature has not explicitly expressed contrary intent." *State v. Robinette*, 944 N.W.2d 242, 249 (Minn. App. 2020), *review granted* (Minn. June 30, 2020). This doctrine applies so long as (1) the legislature does not issue a statement of intent to abrogate the amelioration doctrine; (2) the amended law mitigates punishment; and (3) final judgment was not entered in the contested case before the effective date of the amendment. *State v. Kirby*, 899 N.W.2d 485, 489 (Minn. 2017). Here, there is no legislative statement limiting application of the August 1, 2019 amendments to the sentencing guidelines; the reduction in custody-status points and misdemeanor/gross-misdemeanor units has the effect of mitigating punishment; and appellant had not been sentenced before the effective date of the amendments.

The appropriate remedy in this situation is to remand to the district court for resentencing consistent with the corrected criminal-history score. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017), *citing Molina-Martinez v. United States*, 136 S. Ct.

1338, 1343-44 (2016) (directing remand to the district court when defendant's criminal-history score was incorrect but nevertheless resulted in a sentence within the presumptive range).

Affirmed in part, reversed in part, and remanded