STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0536

State of Minnesota,
Respondent,

vs.

Darren Ray Liimatainen,
Appellant.

Filed December 6, 2021
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge

Carlton County District Court
File Nos. 09-CR-18-1671, 09-CR-19-1106

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

Lauri A. Ketola, Carlton County Attorney, Carlton, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Reilly, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Darren Ray Liimatainen appeals from the district court's revocation of his probation in two cases. He argues that the district court failed to make the required findings before revoking his probation and that one of his sentences was calculated using an incorrect criminal history score. We affirm the district court's decision to revoke Liimatainen's probation. But because respondent State of Minnesota failed to prove that Liimatainen's criminal history score properly included a felony point for a prior fifth-degree drug conviction, we reverse and remand for a new sentencing hearing.

FACTS

The state charged Liimatainen with fifth-degree possession of methamphetamine on September 5, 2018. *See* Minn. Stat. § 152.025, subd. 2(1) (2018). On June 11, 2019, while the fifth-degree drug case was still pending, Liimatainen was charged with a new offense—third-degree possession of methamphetamine. *See* Minn. Stat. § 152.023, subd. 2(a)(1) (2018).

Liimatainen pleaded guilty in both cases[1] without any agreement as to his sentence. Following his guilty pleas, a presentence investigation and sentencing worksheet was prepared in each case. The sentencing worksheet for the third-degree offense showed that

[1] Liimatainen entered an *Alford* plea to the fifth-degree offense. An *Alford* plea permits "a court to accept a defendant's guilty plea, even though the defendant [maintains] his innocence, where the State [demonstrates] 'a strong factual basis for the plea' and the defendant clearly [expresses] his desire to enter the plea based on his belief that the State's evidence would be sufficient to convict him." *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (quoting *North Carolina v. Alford*, 400 U.S. 25 (1970)).

Liimatainen had a criminal history score of six, which included one-half point for an April 1, 2013 fifth-degree-drug-possession conviction. At sentencing in September 2019, the district court granted Liimatainen's motion for downward dispositional departures in both cases. The district court sentenced him to 21 months for the fifth-degree offense and 57 months for the third-degree offense, stayed execution of both prison sentences, and placed him on probation for five years. As a condition of probation, the district court ordered Liimatainen to enter and successfully complete drug court if accepted.

Liimatainen entered drug court in December 2019 but was ultimately discharged after less than a year due to his inability to follow program rules. His violations included missing curfew and relapsing, skipping treatment sessions, failing to complete a treatment program, and failing to cooperate and be truthful with probation. Sanctions such as community service and jail time did not improve his compliance with the program. In discharging Liimatainen from drug court, probation noted concern about his commitment to treatment, his high risk of relapse, and the hostility and toxicity of his environment to the recovery and treatment process.

In the fall of 2020, probation filed a formal probation violation report in the district court. Probation subsequently filed three addendums to the report that specified additional probation violations. These mostly concerned Liimatainen's performance in drug court, but one addendum filed in December 2020 alleged that Liimatainen had failed to contact his probation agent as directed.

On January 5, 2021, the parties appeared for a probation violation hearing in the district court. Liimatainen waived his right to have a contested hearing. He admitted that

he had violated his probation by using methamphetamine and by failing to complete drug court, and he acknowledged that the violations were intentional and inexcusable. In exchange for these admissions, the state withdrew the remaining alleged violations.

The district court scheduled a separate hearing to consider a disposition for the probation violations. At that hearing, probation and the state asked the district court to revoke Liimatainen's probation and execute his prison terms. Liimatainen requested continued probation. After explaining its rationale on the record, the district court revoked Liimatainen's probation and executed his 21- and 57-month sentences.

Liimatainen appeals.

DECISION

I. The district court did not abuse its discretion in revoking Liimatainen's probation.

Liimatainen first argues that the district court erred in revoking his probation. "The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But whether the district court made the findings required to revoke probation is a question of law, which this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In *Austin*, the Minnesota Supreme Court directed district courts to consider three factors (*Austin* factors) before revoking probation and make specific findings on each of these factors. *Austin*, 295 N.W.2d at 250. A 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." *Id.* The third factor requires a district court to further consider 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.* at 251. District courts must clearly address the three *Austin* factors and not merely recite them or give "general, non-specific reasons for revocation." *Modtland*, 695 N.W.2d at 608.

Liimatainen challenges the district court's decision on the third factor. Specifically, he argues that the district court failed to explicitly find that the need for confinement outweighed the policies favoring probation and thereby abused its discretion.

Before pronouncing its disposition for the probation violations, the district court observed that Liimatainen was given both "the benefit of a [downward dispositional] departure" and the "support of a treatment court." The district court stated that, as a treatment-court participant, Liimatainen had opportunities to address his chemical use and mental-health challenges but squandered them. Although Liimatainen claimed he was ready for change, the district court did not find him to be credible. It noted the multiple violations and observed "it simply does not appear to the Court that keeping you on probation is going to result in any change in the situation." The district court stated that allowing Liimatainen to remain on probation would diminish both the seriousness of his offenses and the significance of the sentencing judge's decision to depart from the sentencing guidelines. While the district court acknowledged that prison "may not get

[Liimatainen] better," his sentences would allow him to achieve a significant period of sobriety. Finally, the district court found that "confinement is necessary to protect the public from further criminal activity" and "it would only depreciate the seriousness of defendant's probation if it is not revoked."

As Liimatainen points out, the district court did not state that the need for confinement outweighs the policies favoring continued probation. *See Austin*, 295 N.W.2d at 250. But the supreme court has cautioned that merely parroting the language of the *Austin* factors without performing any real analysis is insufficient. *See Modtland*, 695 N.W.2d at 608.

We can see from the district court's remarks that it did conduct a meaningful analysis of the third *Austin* factor. It addressed the substantial break Liimatainen received and his failure to avail himself of opportunities to succeed on probation. And it considered the value of continuing Liimatainen's probation, concluding that his limited compliance and continued drug use made his prospects of success slim. On the other hand, the district court listed the myriad considerations supporting incarceration, including the considerations articulated in the *Austin* decision. Ultimately, it concluded that these considerations outweighed any possible benefit of continued probation. Given this analysis, we conclude that the district court appropriately considered whether the need for confinement outweighed the policies favoring probation.[2]

[2] Liimatainen relies on several nonprecedential opinions where this court reversed based on insufficient consideration of the third factor. But we are not bound by nonprecedential opinions. *See Jackson ex rel. Sorenson v. Options Residential, Inc.*, 896 N.W.2d 549, 553 (Minn. App. 2017) (stating "we are bound by precedent established in the supreme court's

Liimatainen argues that, even if the district court's analysis was sufficient, the record does not support its determinations. He first contends that his conduct does not threaten public safety because he is merely a drug user. However, given that Liimatainen's continued use of illegal drugs violates criminal laws, the district court was within its discretion to conclude that he poses a public-safety concern.

Liimatainen also argues that because the district court had the ability to impose intermediate sanctions in lieu of prison time, the record does not support the district court's determination that continued probation would unduly depreciate the significance of his violations. The record shows that Liimatainen was given numerous opportunities to comply with probation, including sanctions of community service and jail time. These sanctions—and the threat of further intermediate sanctions—did not result in probation compliance. Thus, the district court did not abuse its discretion in determining that continued probation would depreciate the seriousness of the violations.

Finally, Liimatainen argues that the district court's decision to revoke his probation failed to account for his mental-health challenges. The district court did address his mental-health struggles. Ultimately, however, Liimatainen's probation violations were all related to his drug use. The district court did not abuse its discretion in determining that Liimatainen required a correctional setting to address that problem. This was a decision within the district court's discretion.

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opinions and our own published opinions"). Nonetheless, we have reviewed the cases cited and conclude that they are factually distinguishable from the circumstances in Liimatainen's case.

Liimatainen was given multiple chances to address his drug addiction and comply with probation. He received a downward dispositional departure from the sentencing guidelines. He was accepted into drug court. He was provided with the opportunity for drug treatment. Drug court was forgiving of Liimatainen's initial challenges, but ultimately discharged him because he would not comply with the program and sanctions were not working. As Liimatainen notes, prison should be a last resort. *Austin*, 295 N.W.2d at 250. But here, the district court concluded that there were no other options for Liimatainen. Because the district court conducted the appropriate analysis, the district court's ultimate decision to revoke Liimatainen's probation was not an abuse of discretion.

II. The state failed to establish that a 2013 drug conviction was properly included in Liimatainen's criminal history score when he was sentenced for the third-degree drug conviction.

Liimatainen challenges his 57-month sentence for the third-degree drug conviction, arguing that his 2013 conviction for a fifth-degree drug offense was improperly included as a felony offense in his criminal history score. Any "sentence based on an incorrect criminal history score is an illegal sentence" requiring resentencing. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007); *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). The state has the burden of establishing the defendant's criminal history score. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

As noted, Liimatainen's criminal history score for the third-degree offense included one-half point from a 2013 conviction for a fifth-degree drug offense. Felony points from a prior conviction may only be included in a defendant's criminal history score if the prior conviction was punishable as a felony under Minnesota law at the time of the new offense

being sentenced. Minn. Sent. Guidelines 2.B.7.a (2018). "The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies." Minn. Sent. Guidelines 2.B.7.a. Additionally, "[t]he severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense." Minn. Sent. Guidelines 2.B.1 (2018).

The 2016 Drug Sentencing Reform Act (DSRA) took effect on August 1, 2016. 2016 Minn. Laws, ch. 160. As a result of the DSRA, fifth-degree drug offenses that were previously felonies became gross misdemeanor crimes so long as the defendant did not have a prior qualifying drug offense and possessed "less than 0.25 grams or one dosage unit or less" of drugs other than heroin, or "less than 0.05 grams" of heroin. Minn. Stat. § 152.025, subd. 4(a) (2018); *see*, *e.g.*, Minn. Stat. § 152.025, subd. 2 (2014).

In *State v. Strobel*, the defendant argued that a 2012 fifth-degree drug offense was improperly included as a felony in his criminal history score because the state failed to establish that the 2012 conviction would have been a felony—and not a gross misdemeanor—at the time of the offense to be sentenced, which occurred after the effective date of the DSRA. 932 N.W.2d 303, 306 (Minn. 2019). The supreme court agreed. *Id.* at 307-10. Because the state did not prove the weight of the drugs involved in the 2012 fifth-degree offense, the conviction could not be treated as a felony in calculating the defendant's criminal history score. *Id.*

Liimatainen argues that his criminal history score for his third-degree drug conviction improperly included one-half point from his 2013 fifth-degree drug conviction.

He contends that his sentence should be reversed and remanded because the state failed to prove that the fifth-degree drug conviction would have been a felony offense if committed at the time of the current third-degree drug offense.

The record does not establish that Liimatainen's 2013 fifth-degree drug offense would have been a felony after the enactment of the DSRA.[3] Thus, we cannot conclude that the state met its burden of proving that the 2013 offense should be treated as a felony. But because Liimatainen did not challenge his criminal-history score in the district court, the state should have an opportunity to meet its burden. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008). *rev. denied* (Minn. July 15, 2008) (stating "on remand, [the state] is permitted to further develop the sentencing record so that the district court can appropriately make its determination"). We therefore reverse Liimatainen's sentence for his third-degree drug conviction and remand to the district court. On remand, the state should be allowed to develop the record regarding the 2013 fifth-degree drug offense. And if the state fails to satisfy its burden of establishing that the 2013 conviction should be treated as a felony, Liimatainen must be resentenced.

Affirmed in part, reversed in part, and remanded.

[3] The inclusion of the 2013 conviction resulted in a criminal history score of 6 rather than 5. With a criminal history score of 5, the presumptive sentence for Liimatainen's current third-degree controlled substance offense would have been 51 months instead of 57 months. Minn. Sent. Guidelines 4.C (2018) (showing presumptive sentence lengths for most felony offenses involving controlled substances).