STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1746

State of Minnesota,
Respondent,

vs.

Joseph Troy Horton,
Appellant.

Filed October 3, 2022
Affirmed
Segal, Chief Judge

Stearns County District Court
File Nos. 73-CR-19-9862, 73-CR-17-2214

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

Janelle P. Kendall, Stearns County Attorney, River D. Thelen, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Segal, Chief Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the revocation of his probation and the imposition of an aggravated sentence, arguing that the district court made insufficient findings to support

the revocation decision, the record does not establish that the need for confinement outweighs the policies favoring continued probation, the notice of the grounds for revoking his probation was inadequate, and the statutory factor used at sentencing to aggravate his sentence does not apply to the offense to which he pleaded guilty. We affirm.

FACTS

Respondent State of Minnesota charged appellant Joseph Troy Horton with three offenses related to prostitution, each involving an aggravating factor. The complaint included one count of promoting prostitution with the aggravating factor that the offense involved more than one sex-trafficking victim; one count of promoting prostitution with the aggravating factor that the offense involved a sex-trafficking victim who suffered bodily harm; and one count of receiving profits from prostitution with the aggravating factor that the offense involved a sex-trafficking victim who suffered bodily harm.

Pursuant to a plea agreement, Horton pleaded guilty to promoting prostitution in violation of Minn. Stat. § 609.322, subd. 1a(2) (2016), with the aggravating factor that the offense involved more than one sex-trafficking victim, as provided in Minn. Stat. § 609.322, subd. 1(b)(4) (2016). In exchange, the state dismissed the remaining two counts and supported Horton's request for a downward dispositional departure. During the plea colloquy, Horton admitted that he drove two individuals to various places to engage in prostitution with the intent of aiding in the prostitution of those individuals. He also admitted that both individuals were sex-trafficking victims.

The district court imposed a 228-month prison sentence, stayed for 25 years. The conditions of Horton's probation included that he follow all recommendations from his

chemical-use assessment; complete individual therapy and follow all recommendations; refrain from possessing or using sexually explicit material; and follow all rules of the county's "enhanced probation" program. Horton was also prohibited from accessing the internet except as approved by his probation officer, and was required to tell his probation officer about, and to install device-monitoring software on, all electronic devices in his possession.

Less than three months after he was sentenced, Horton's probation officer filed a probation-violation report alleging three violations. In the report, the probation officer alleged, first, that Horton failed to follow all recommendations from his chemical-use assessment because, although Horton successfully completed residential chemical-dependency treatment, he was unsuccessfully discharged from outpatient treatment. The probation officer alleged, second, that Horton had violated the internet-access conditions of his probation because he acquired a cell phone without reporting it to his probation officer and without having monitoring software installed. The third alleged violation was that Horton missed a "whereabouts" verification, violating the condition that he follow all rules of enhanced probation.

The probation-violation report contained extensive comments and supporting documents related to Horton's violations and other behavior. The report noted that "[Horton's] dislike of [his outpatient treatment] was a constant and on-going topic with [his probation officer] until his eventual discharge," that Horton had repeatedly expressed unhappiness with the phone-monitoring software, and that sexually explicit images had

been found on his phone.[1] The report also noted that Horton had sought, but was denied, permission to have contact with prison inmates who had "a prostitution-type case" or whose offense involved "a possible sex trafficking victim." The report went on to state that it was believed that Horton was nevertheless using an unmonitored device to contact one of those inmates.[2] The probation officer included the discharge summary from Horton's outpatient treatment in his report. The discharge summary stated that Horton was discharged because of "[o]ngoing efforts . . . to circumvent rules of probation, not making progress in treatment due to his ongoing focus on unhappiness with probation," and "interfering with others' recovery." Horton's probation officer recommended that Horton's probation be revoked.

At the probation-revocation hearing, Horton admitted the three violations identified in the report—that he was unsuccessfully discharged from outpatient treatment, possessed an unreported phone without monitoring software (the unreported phone), and missed a "whereabouts" verification. Horton also admitted that the violations were intentional or inexcusable.

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[1] Horton asserts that the images were not "sexually explicit" because they did not contain nudity or pornography, citing a Minnesota Department of Corrections (DOC) policy defining "sexually explicit material." The probation-violation report stated that the images, "while not full nudity or pornography, [were] still sexually explicit," noting that one "depicted the partially exposed buttocks of a female" and the other showed a woman "in a sexual manner with her hand by her crotch and arm/hand partially covering her breasts."

[2] At the probation-revocation hearing, the probation officer acknowledged that Horton was allowed to have telephone contact, and that it was permission for video contact that had been denied.

After hearing testimony from Horton and the probation officer, the district court revoked Horton's probation. The district court made certain findings on the record followed by a written order. The district court based its decision on the three violations admitted by Horton and Horton's admission that the violations were intentional or inexcusable. The district court found the testimony of the probation officer to be "exceedingly credible" and that the need for confinement outweighed the policies favoring probation on all three of the subfactors set out in *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005)—that confinement is necessary to protect the public, that the offender is in need of correctional treatment which can be most effectively provided if he is confined, and that it would unduly depreciate the seriousness of the violations if probation was not revoked.

DECISION

On appeal, Horton challenges both the revocation of his probation and the aggravation of his sentence. We address each in turn.[3]

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

In challenging the revocation of his probation, Horton argues that the district court's findings were not legally sufficient and were not supported by the record. He also argues

[3] The case caption includes two district court files, 73-CR-19-9862 and 73-CR-17-2214. The district court revoked Horton's probation in both cases at the same hearing but issued separate orders revoking probation in each case. In this appeal, Horton is only challenging his probation revocation and sentence in 73-CR-19-9862, and we limit our discussion to that case.

that the state failed to provide him with adequate notice of the grounds it was relying on to seek a revocation of his probation.

To revoke probation, 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 [the] need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). "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." *Id.* at 249-50. But we review de novo "whether a lower court has made the findings required under *Austin*." *Modtland*, 695 N.W.2d at 605. "[I]n making the three *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608.

A. The district court's findings are legally sufficient and supported by the record.

Horton contends that the district court failed to make sufficient findings on the third *Austin* factor—whether the need for confinement outweighs the policies favoring probation—and that the findings that were made by the district court are not supported by the record. In making a determination on 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." *Modtland*, 695 N.W.2d at 606-07 (quotation omitted). This involves consideration of the *Modtland* subfactors—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 607 (quotation omitted).

Horton argues that the district court made legally insufficient findings on the third *Austin* factor because it fell short of *Modtland*'s call to create a "thorough, fact-specific record[]" and "convey [its] substantive reasons for revocation and the evidence relied upon." *Id.* at 605. A district court's decision to revoke probation must be "based on sound judgment and not just [its] will." *Austin*, 295 N.W.2d at 251. "The decision to revoke cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* (quotations omitted).

Regarding the first *Modtland* subfactor, the district court found in its written order that "confinement is necessary to protect the public." In making this finding, the district court noted Horton's "extensive criminal history" and the fact that Horton "has been unable to conduct himself in a pro-social manner in the community for even the shortest amount of time after sentencing." Horton argues that the record does not support the district court's finding because (1) "there was no allegation . . . that Horton had committed or attempted to commit any new crime," (2) the district court focused on Horton's criminal history rather than his likelihood of reoffending, (3) the district court's finding that Horton "has been unable to conduct himself in a pro-social manner in the community" was general and non-specific, and (4) Horton made only two calls with the unreported phone.

We are not persuaded by Horton's argument. First, an offender need not commit a new crime for a district court to properly determine that confinement is necessary to protect the public. *See, e.g.*, *State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (addressing and rejecting the "often-heard argument that [appellant] 'committed no new crimes' while he was on probation")), *rev. denied* (Minn. July 19, 2011). Second, Horton's criminal history is a relevant consideration under the third *Austin* factor. *See State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (stating that individuals convicted of more severe offenses or with longer criminal histories may be entitled to "less judicial forbearance" on probation). Third, the district court's statement that Horton "has been unable to conduct himself in a pro-social manner in the community" was made in the context of several pages of written findings regarding Horton's behaviors—including the fact that staff at his chemical-dependency treatment "were concerned about [Horton's] behavior in and out of treatment, citing his criminal thinking." And finally, the fact that Horton made only two calls from the unreported phone does not alter the fact that he possessed such a phone in direct violation of the conditions of his probation.

Next, the district court found under the second *Modtland* subfactor that Horton is in need of treatment that can most effectively be provided if he is confined. The district court relied on the fact that Horton "was discharged from treatment because of his behaviors while creating an environment that was disruptive to the therapy and recovery of other participants." Horton argues that these findings were non-specific and that the district court failed to credit the fact that Horton remained sober following his discharge. He also argues that there is no evidence that treatment would be more effective in prison.

The district court's findings regarding Horton's need for treatment, however, are supported by the discharge summary from Horton's outpatient treatment. The discharge summary states that Horton was discharged for "[o]ngoing efforts . . . to circumvent rules of probation" and "not making progress in treatment due to his ongoing focus on unhappiness with probation." The discharge summary also recommends that Horton "be placed in a supervised living facility where he can be more closely monitored," and that "[h]is substance abuse and criminality need to be addressed simultaneously." Further, the probation officer's testimony supports the district court's finding that treatment could be most effectively provided if confined. The probation officer testified that Horton had "been in custody for an extended period of time, and he did have access to cognitive programming when he was in the Department of Corrections and could also participate in cognitive programming while he was out in the community when he was over at [outpatient treatment]." The probation officer further testified that "[n]o place in the community is going to be able to address his criminality. The only place that is, is through the Department of Corrections."

As to the third *Modtland* subfactor—whether it would unduly depreciate the seriousness of the violation if probation were not revoked—Horton argues that the district court applied the wrong legal standard in analyzing this subfactor. In support of this argument, Horton points to the fact that the district court erroneously substituted the word "sentencing" for "violation" at the probation-revocation hearing, stating on the record that "it would unduly depreciate the seriousness of the *sentencing* in that file if Mr. Horton's probation was not revoked." (Emphasis added.) Horton also argues that his possession of

the unreported phone was not serious and was merely a "technical violation" that did not justify revoking probation. Again, we are not persuaded.

Although the district court misstated the third subfactor in its oral findings, the district court's written order sets out the correct legal standard, that "[f]ailure to execute would unduly depreciate the seriousness of the *violation*." (Emphasis added.) And the district court's findings demonstrate that it considered the seriousness of the violations. For example, the district court observed that it was "[l]iterally within weeks of [receiving the downward dispositional departure to] probation, [that Horton] was repeatedly pushing against the probationary requirement of monitoring" and that "[a] lack of sufficient punishment will encourage future criminal behavior and place the public at risk."

In short, the district court's findings on the three *Modtland* subfactors—and the third *Austin* factor as a whole—are detailed, relevant, and supported by the record. We thus discern no abuse of discretion by the district court in determining there was sufficient evidence "that [the] need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250.

B. Horton had sufficient notice of the grounds for revoking probation.

Horton also contends that his right to procedural due process was violated because "[t]he state gave Horton no notice of [the] grounds upon which it would seek revocation." Horton's argument focuses on the fact that an allegation made by the prosecutor during the probation-revocation hearing was not included in the probation-violation report. The allegation—that one of the DOC inmates that Horton contacted during his probation "share[d] a mutual victim" with Horton—was referenced by the district court during the

hearing. The district court commented that it was "exceedingly concerned with regard to the contact with the former DOC inmate at Shakopee where they were engaged or purportedly had the same victim as noted by [the prosecutor]." Horton argues that the district court's reliance on the allegation violated his due-process rights because the state failed to provide him with notice of the allegation and the allegation was not supported by any evidence.

Horton, however, failed to raise this issue before the district court and the issue is thereby forfeited. *Austin*, 295 N.W.2d at 252. But even if we were to consider this issue, it would not merit reversal. While Horton is correct that, under the United States and Minnesota Constitutions and state law, he is entitled to notice that is "adequate to warn the [probationer] of the issues that could come up at the hearing," this requirement was satisfied here. *Id.* at 252 n.1; *see also* Minn. Stat. § 609.14, subd. 2 (2016).

First, the probation-violation report identified the three violations that formed the basis for his probation revocation. Second, the probation-violation report alleged that Horton was seeking, and potentially having, contact with "female inmates at Shakopee," one of whom had "a prostitution-type case and the other a possible sex trafficking victim." Thus, even though the report did not specify that Horton and the female inmate allegedly shared a mutual victim, he had notice that these alleged contacts "could come up at the hearing." *Austin*, 295 N.W.2d at 252 n.1. Finally, although the district court referenced this allegation during the hearing, it never identified it as a probation violation either orally at the hearing or in its written order. We thus conclude that Horton's due-process right to adequate notice of the grounds for revocation was not violated.

In addition, to the extent Horton argues that the prosecutor's reliance on this allegation constitutes an evidentiary error, any such error was harmless because the district court did not rely on this allegation in its written order and the district court articulated multiple other independently sufficient reasons for revoking probation. *See State v. Nowacki*, 880 N.W.2d 396, 402 (Minn. App. 2016) (holding that an evidentiary error in a probation-revocation hearing was harmless where "the district court did not indicate that [the evidence was] the basis for the probation violation, and the record does not reflect any connection between [the evidence] and the court's revocation decision").

II. Horton's aggravated sentence was lawful.

The final issue is Horton's challenge to the validity of his aggravated sentence. Before reaching that issue, however, we must address the state's argument that Horton forfeited this issue because he did not raise it before the district court. Horton acknowledges that he has not yet raised the issue before the district court but urges us to review the issue in the interests of judicial economy. He argues that such review is appropriate because an unlawful sentence can be challenged at any time and because his argument is based solely on a question of law that has been fully briefed by the parties and can be decided on the existing record. We are persuaded that appellate review will serve the interests of judicial economy and will therefore consider the issue. *See* Minn. R. Crim. P. 28.01, subd. 11 (allowing this court to "review any order or ruling of the district court or any other matter, as the interests of justice may require").[4]

[4] The state also argues that Horton's challenge to his sentence "is actually a challenge to the sufficiency of his underlying plea" that should have been raised before the district court.

Turning to the merits of Horton's sentencing challenge, Horton argues that because he was convicted of promoting the prostitution of an individual, not "sex trafficking," the district court erred by applying the aggravating factor set out in Minn. Stat. § 609.322, subd. 1(b)(4)—that "the offense involved more than one sex trafficking victim."[5] This argument presents a question of statutory interpretation that we review de novo. *State v. Ivy*, 902 N.W.2d 652, 664 (Minn. App. 2017), *rev. denied* (Minn. Dec. 19, 2017). When interpreting a statute, an appellate court must first "determine whether the statute's language, on its face, is ambiguous." *State v. Overweg*, 922 N.W.2d 179, 183 (Minn. 2019) (quotations omitted). In the absence of an ambiguity, an appellate court will "give words and phrases their plain and ordinary meaning." *State v. Hayes*, 826 N.W.2d 799, 803-04 (Minn. 2013) (quotation omitted). And, "[i]f a word is defined in a statute, that definition controls." *State v. Morgan*, 968 N.W.2d 25, 30 (Minn. 2021).

As a first step in analyzing Horton's argument, we note that neither party argues that the statutory language at issue is ambiguous. We agree and thus apply the plain and ordinary meaning of the statutory provisions.

We start the second step of the analysis with the aggravating-factor section of Minn. Stat. § 609.322 (2016), which provides, in relevant part, that "[w]hoever violates

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But Horton is challenging the applicability of a statutory aggravating factor to his sentence, not the sufficiency of Horton's admissions in the plea colloquy. While Horton's challenge does implicate his plea agreement, potentially affecting the remedy if we were to reverse, this does not affect Horton's ability to challenge the validity of his sentence following the revocation of his probation. *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987).

[5] Engaging in the "sex trafficking of an individual" is a separate crime set out in Minn. Stat. § 609.322, subd. 1a(4) (2016).

paragraph (a) or subdivision 1a" of the statute is subject to an aggravated sentence, if "the offense involved more than one sex trafficking victim." Minn. Stat. § 609.322, subd. 1(b)(4). The crime of promoting prostitution—the crime Horton was convicted of—is an offense set out in subdivision 1a of the statute. Minn. Stat. § 609.322, subd. 1a(2). Thus, under the plain language of the aggravating-factor section of Minn. Stat. § 609.322, the offense of promoting prostitution is an offense that can be aggravated under subdivision 1(b) of that same statute.

We next consider whether Horton's "offense involved more than one sex trafficking victim." Minn. Stat. § 609.322, subd. 1(b)(4). Here, in his plea colloquy, Horton admitted that he transported—by driving—at least two individuals "to appointments where [he] knew they were engaging in prostitution," with the "intent . . . to aid in the prostitution of those individuals."[6] His offense thus involved more than one victim, leaving us with a single remaining question—whether the victims qualify as "sex trafficking victim[s]."

The phrase "sex trafficking victim" is defined in Minn. Stat. § 609.321, subd. 7b (2016), as "a person subjected to the practices in subdivision 7a." Subdivision 7a defines the phrase "sex trafficking," in relevant part, as "receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual." Minn. Stat. § 609.321, subd. 7a(1) (2016). The aggravating factor is thus applicable if Horton's offense of transporting involved "receiving, recruiting, enticing,

[6] We note that Horton also expressly admitted in his plea colloquy that the individuals he drove to "appointments" for the purpose of being prostituted were "sex trafficking victim[s]" under the statutory definition.

harboring, providing, or obtaining by any means" the victims to aid in their prostitution. *Id.*

We conclude that Horton's offense of transporting the victims to aid in their prostitution is the equivalent of "providing" them for that purpose. The word "provide" is commonly defined as "[t]o make available," to "furnish," or "[t]o supply something needed or desired." *The American Heritage Dictionary of the English Language* 1418 (5th ed. 2018). Here, by transporting the victims, Horton was "providing" them—making them available, furnishing, or supplying them—to aid in their prostitution. The individuals driven by Horton were thus "sex trafficking victims" within the meaning of Minn. Stat. § 609.321, subd. 7b, and the district court did not err when it imposed an aggravated sentence under Minn. Stat. § 609.322, subd. 1(b)(4).

Affirmed.