

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0082**

State of Minnesota,
Respondent,

vs.

David Homer South,
Appellant.

**Filed December 19, 2022
Reversed and remanded
Slieter, Judge**

Crow Wing County District Court
File No. 18-CR-18-3709

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Slieter, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this challenge to a probation-revocation decision, appellant first argues that the district court erred by determining that he was on probation when the alleged violations

occurred. Second, appellant argues that the district court erred by not enforcing the agreement reached with the state, which would result in placing appellant back on probation following his admission to the violations and the entry of convictions. Finally, appellant argues that the district court failed to make the required findings regarding his jail credit. Because the record does not establish whether appellant was on probation at the time of the alleged violations, we reverse and remand.

FACTS

In September 2018, appellant David Homer South was charged with ten counts of criminal sexual conduct alleging that he sexually assaulted his two minor granddaughters from January 2014 through July 2017. In November 2018, as part of his pretrial release conditions, South was ordered to have no contact with the victims and was also prohibited from consuming alcohol or entering any establishment that served alcohol.

In May 2019, South pleaded guilty to two counts of second-degree criminal sexual conduct. In exchange for his guilty plea, South received a stay of adjudication on both counts and dismissal of the eight remaining charges.

On August 21, 2019, during the scheduled sentencing hearing, the district court accepted the agreement and imposed a dispositional departure, stayed adjudication, placed South on supervised probation for 25 years, and imposed several probationary conditions. Among the conditions, South was to have no contact with the victims or the victims' families and was prohibited from consuming alcohol or entering any establishment that served alcohol. South was also ordered to successfully complete sex-offender treatment at

a facility approved by the court or probation. At the time of sentencing, South was participating in sex-offender treatment with CORE Professional Services.

In September 2020, the probation agent filed a probation-violation report alleging four violations, all of which had been disclosed by South during a polygraph conducted by CORE as a regular part of treatment: contact with a minor, contact with the victims and the victims' families, and entering an establishment that served alcohol. Additionally, the report alleged that South was discharged from sex-offender treatment because he "failed to progress" in treatment.

During the probation-violation hearing in April 2021, the parties informed the district court that they had reached an agreement. South agreed to waive his right to a contested hearing, admit the violations, participate in "maintenance and criminal sexual history polygraph[s]," have the convictions immediately entered for the two counts to which he previously pleaded guilty, and be "admitted back into treatment." In exchange for compliance with all these conditions, South would be placed back on probation if he "pass[ed]" the polygraphs.

Upon inquiry by the district court, the parties explained what was meant to "pass" the polygraphs. Defense counsel stated:

As long as Mr. South is truthful, that's passing the polygraph exam. That's as I understand it, just put all the cards on the table, all the history, answer all the questions truthfully. That's what I understand passing it means, is being truthful. And that's what Mr. South understands too.

The state concurred, indicating that South would pass the polygraph as long as he provided “a full disclosure.” The district court accepted the agreement and South’s admission to the probation violations.

Consistent with the terms of the agreement, South participated in a polygraph on July 1, 2021. Following the results of the polygraph, CORE concluded that, though South “passed” the maintenance polygraph by being honest, it no longer believed that South was amenable to outpatient sex-offender treatment. As a result, CORE “recommend[ed] inpatient sex offender treatment in a secure setting.”

Directly resulting from South’s admissions made during the polygraph, the probation agent filed an addendum to the probation-violation report, noting that South “disclosed contact with multiple victims” and “mentioned being alone with a victim twice.” South “also discussed ongoing contact with the victims’ families, specifically [South]’s children, who are parents to the victims.”

During the first appearance on the new violations, the state informed the district court that, because CORE “will not take [South] back,” it was no longer bound by the agreement because the state had “no authority whatsoever to tell CORE they have to accept someone.” South denied the new violations, and an evidentiary hearing was scheduled.

During the probation-violation hearing, in July 2021, South’s attorney argued that South had complied with the April agreement and asked the district court to enforce it. The district court stated that it could not enforce the agreement, though it acknowledged that the original sentencing order did not specifically require that South’s treatment be completed at CORE, and South could argue for treatment at another program as part of the

disposition hearing. South decided to waive his right to a contested hearing and admit the additional probation violation. The district court postponed the disposition hearing to allow South to present an alternative treatment facility that would admit him.

During the disposition hearing South presented evidence of a treatment program that was willing to admit him. The district court issued an order in October 2021 and specifically found, based upon South's April admissions, that South had committed two probation violations. The district court concluded that South was not amenable to treatment as part of a probationary condition and revoked South's probation. The district court imposed and executed concurrent prison sentences of 110 and 150 months, and ordered ten years of conditional release. South appeals.

DECISION

"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). 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." *Id.* at 250. Whether the district court considered these factors is a question of law, which appellate courts review *de novo*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

"[B]efore a probation violation can occur, the condition alleged to have been violated must have been a condition actually imposed by the court." *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004); *see also* 9 Henry W. McCarr & Jack S. Nordby, *Minnesota*

Practice § 36-60 (4th ed. 2020) (“If a condition was not actually and properly imposed, no violation can result even if the defendant believes and admits that it was a condition of probation.”). That is, the defendant must have been placed on probation at the time the violation is alleged to have occurred. *Ornelas*, 675 N.W.2d at 80.

South argues that the district court erred by concluding that he violated the conditions of his probation because the record does not demonstrate that South was on probation when the violations allegedly occurred. We agree.

The district court found, from South’s admissions, that South (1) violated the no-contact-with-victim condition because he was twice alone with a victim, and (2) violated probation by entering an establishment that served alcohol.

We have held that:

When a probationer waives the first part of a revocation hearing, the state is no longer obliged to present evidence to prove the violations, and the district court may base its finding on the violation report and the probationer’s waiver, which serves as a stipulation to the state’s allegations in the violation report.

State v. Xiong, 638 N.W.2d 499, 503 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002).

However, neither the violation report nor South’s testimony establish that South was on probation at the time of his admitted conduct.

First, during the April probation-violation hearing during which South admitted to the violations, the district court read from the probation-violation report when questioning South. But the report provides no dates as to when the alleged violations occurred. The district court asked South whether the allegations were true that he had contact with the

victim “after [his] conviction during the summer of 2019.” South stated “Yeah, they are true, but I’m not certain about the date that my son [who brought the victims] made his visit. But I said at the time of the [September 2020] polygraph that it was after my conditions were in effect.” South then stated that the incident would have occurred around “the first of May 2019, and the restrictions went on my -- on record from the Court on about the 20th or so of May 2019.” Critically, South was not placed on probation until August of 2019.

Further uncertainty as to whether South was yet on probation at the time the violations occurred are reflected in the following colloquy from the same hearing. The prosecutor asked South,

THE STATE: At the time -- even if it was before you were sentenced, and *granted then it might not be a violation of probation*, but you’ve been continuously on a condition to have no contact since you were first arraigned on this case, correct?”

SOUTH: So the no-contact rule was in place at that time?

THE STATE: I mean, you knew that you were required as a condition of your release to not have any contact with any minors, correct?

SOUTH: But I was under the impression that it didn’t take effect until the Court date, that 24th.

THE STATE: You understand prior to entering your plea, you were still under conditions *that the Court set back on November 5th of 2018*, that required that you have no contact?

SOUTH: Okay.

THE STATE: And you knew you weren’t supposed to have contact?

SOUTH: Yup.

THE STATE: Okay. *So you're saying it may have happened before you entered your plea and it may have happened after you[] entered your plea, you're not sure; but regardless, you've been under conditions to not have contact since November 5th of 2018, correct?*

SOUTH: Okay, so it was in effect then. Okay.

(Emphasis added.)

And even if we consider South's testimony during the September 2021 disposition hearing, it also provides no more detail as to whether South was on probation when the violations occurred. South was asked by his attorney, "When you were with the polygraph examiner answering his questions, [you were] asked . . . about a number of disclosures that you made. Had those all happened, those instances all happened *since you had been convicted*, since you had entered your guilty plea?" (Emphasis added.) South answered, "Yes."

South had not yet been *convicted* at the time he pleaded guilty. South pleaded guilty in May 2019. South was placed on probation without a conviction (stay of adjudication) in August 2019. South was convicted of the two offenses after he admitted the probation violations in April 2021.

The state argues that the probation-violation report combined with South's testimony is sufficient to conclude that South violated probation. But as we have already explained, the probation-violation report does not add clarity because it also indicates that these incidents occurred "after [South's] conviction during the summer of 2019." In other words, the report simply mimicked what South reported during his September 2020

polygraph interview, it erroneously states that South was convicted, and it refers to a time period for the alleged violation that was before South had been placed on probation.

At no time during the April admission hearing, nor during the disposition hearing, was South asked whether the violation occurred on or after August 21, 2021, the date on which the district court imposed the probation conditions. It is axiomatic that a probation violation can only be found when the violation is of a probation-condition that is actually imposed by the court. *See Ornelas*, 675 N.W.2d at 80.

This record fails to demonstrate whether South was on probation at the time “the specific . . . conditions . . . were violated.” *Austin*, 295 N.W.2d at 250. Thus, the district court abused its discretion in revoking South’s probation. *Id.* at 249-50. Therefore, we reverse and remand for further proceedings. The decision whether to reopen the record on remand rests within the district court’s sound discretion.¹

Reversed and remanded.

¹ Because we remand for further proceedings to determine whether South was on probation at the time of the admitted conduct, we need not address South’s second argument that the district court failed to abide by his agreement reached with the state that would place him back on probation. However, we note that the district court believed the agreement required that treatment occur at CORE and that, because CORE would not accept South back, it could not enforce the agreement. Our review of the agreement, as stated orally to the district court, is that it was not limited to treatment by CORE and that South presented evidence of a treatment program other than CORE which was willing to accept him. But because South has been in prison since probation was revoked, we are mindful that a treatment program may no longer be available for South and that an additional evaluation may need to occur. As for South’s third argument regarding jail credit, on appeal, the state concedes that South is entitled to 394 days of jail credit and that the district court failed to clarify in its order and warrant of commitment the amount of jail credit to which South is entitled. Because we reverse and remand on the earlier issue, the district court may also address the jail credit issue at that time.