STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0905

State of Minnesota,
Respondent,

vs.

Anthony Lee Weber,
Appellant.

Filed February 5, 2024
Affirmed
Bjorkman, Judge

Freeborn County District Court
File No. 24-CR-21-993

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

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the revocation of his probation, arguing that reversal is warranted because the district court failed to (1) obtain his valid waiver of counsel and (2) inform him of his right to obtain copies of the evidence supporting revocation.

Alternatively, appellant contends that the district court abused its discretion by revoking probation without supporting evidence and without finding that the policies favoring probation outweigh the need for confinement. We affirm.

FACTS

In October 2021, appellant Anthony Lee Weber pleaded guilty to fifth-degree possession of a controlled substance pursuant to a plea agreement under which he received a stayed 28-month sentence, a dispositional departure. Weber's probation conditions included remaining law-abiding, maintaining contact with probation, keeping probation apprised of changes in contact information, and successfully participating in chemical-dependency treatment. Weber was represented by a public defender during these proceedings.

One year later, Weber's probation officer filed the first of two violation reports. The October 2022 report alleged that Weber violated probation by being unsuccessfully discharged from treatment, not staying in contact with probation, and failing to advise his probation officer of his current address and phone number. Weber chose to represent himself at the November 14 probation-revocation hearing and admitted the violations. After accepting the prosecutor's recommendation to give Weber "one more chance," the district court reinstated his probation, directed Weber to obtain and follow the recommendations of an updated chemical-dependency evaluation, and ordered him to serve 60 days in jail.

On January 30, 2023, Weber's probation officer filed a second violation report, alleging that Weber had not completed the chemical-dependency evaluation, failed to stay

in contact with probation, and had not provided current contact information. At the March 17 first appearance, Weber again represented himself. The district court advised him of his "rights in a probation violation matter," stating:

> When it is alleged that you have violated probation, you are entitled to have a hearing to challenge the allegations. At that hearing, you could be represented by a lawyer, a public defender if you qualify; you would have the right to cross-examine the State's witnesses and challenge the State's evidence; you can call your own witnesses; if you needed to, you could subpoena your witnesses; you would have the right to testify or, if you chose, the right to remain silent. The burden would be on the State to prove the allegations, not on you to disprove them.

Weber denied the allegations. When the district court asked if he wanted a public defender he replied, "Those—those attorneys are all jokes, Your Honor." The district court pressed him to respond to the question, and Weber said, "Sure. I'll take one of them." The court instructed Weber to complete a public-defender application. The record contains no such application.

The following week, Weber appeared for the contested probation-revocation hearing. The prosecutor informed the district court that the parties had not reached an agreement, the state would ask the court to revoke probation and execute Weber's sentence, and that Weber indicated that he did not want a lawyer. The district court explained the next steps:

> Obviously we're here today for a hearing. The State has the burden of proof to prove by clear and convincing evidence that you violated the conditions of your probation and that any violations were intentional and inexcusable. And then they would have to prove, you know, that your probation should be revoked or what the resentencing should be. You would have

> the right to question the witnesses that they call. You could call witnesses. You could testify if you wanted to. You're not going to be forced to testify. You could also present any mitigating evidence or explanation as to why your probation shouldn't be revoked. Or, you know, if—that's if you continue forward with the denials. Or you can enter an admission. If you enter an admission, we don't have that full hearing, and you would tell me what you did that violated your probation. And then we would talk about what the resentencing should be.

Weber said that he understood, but then expressed confusion as to "what I'm supposed to be doing here," and his desire for another opportunity to complete treatment. The district court responded that if Weber admitted the violations, he could explain the circumstances and "argue what you think the appropriate resentencing should be." The district court advised that if Weber disagreed with the alleged violations, the state would have to prove them. The court also reminded Weber of his right to counsel and that he could apply for a public defender. Weber replied, "I'll represent myself, Your Honor." The district court again clarified, "So you're pretty clear on that, that you want to represent yourself?" Weber replied, "Yeah."

Weber then stated his intent to waive his right to a hearing and admit the violations. But he balked when the district court inquired about the facts establishing the violations. Accordingly, the district court treated the hearing as contested. The prosecutor called a Freeborn County corrections agent, who testified to all three violations based on the Minnesota Department of Corrections (DOC) file the agent received from Weber's probation officer. The agent recommended revocation of probation and execution of Weber's sentence.

Weber testified that after he was released from jail, he had nothing and nowhere to go. He acknowledged obtaining chemical-dependency evaluations "on the spot" when he appeared at treatment centers in the past. But he did not go to a treatment center when he was released on this occasion, instead claiming he had an appointment scheduled at the time he was arrested on the probation violation. Weber admitted he has mental-health problems and that his many treatment opportunities have been unsuccessful. And he argued that imposing another prison sentence would not benefit him or the community because his sentence is too short to allow him to get into, let alone complete, a prison treatment program.

At the conclusion of the hearing, the district court found that the prosecutor had proved all three violations by clear and convincing evidence. The district court further found that the violations were intentional and inexcusable, and that reinstating Weber on probation would "unduly depreciate the seriousness of the violation." The district court revoked the stay of execution and ordered Weber to serve his 28-month sentence.

Weber appeals.

DECISION

I. Weber validly waived his right to counsel.

A defendant has a right to counsel in probation-revocation proceedings. Minn. Stat. § 609.14, subd. 2 (2022); Minn. R. Crim. P. 27.04, subd. 2(1)(c); *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006). The defendant may waive the right to counsel so

long as the waiver is "knowing, intelligent, and voluntary."[1] *Jones*, 772 N.W.2d at 504. The validity of a waiver "depends 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In determining whether a waiver is valid, a district court "should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *Id.* at 276 (quoting *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997)). While a signed waiver is preferred, an unwritten waiver "may still be constitutionally valid if the circumstances demonstrate that the defendant knowingly, voluntarily and intelligently waived his right to counsel." *State v. Haggins*, 798 N.W.2d 86, 90 (Minn. App. 2011).

Where, as here, the district court did not expressly find that the defendant's waiver was knowing and intelligent, we review de novo whether the waiver is valid. *See State v. Rhoads*, 813 N.W.2d 880, 886 (Minn. 2012). Reversal is required only if "the particular facts and circumstances of the case" do not "demonstrate a valid waiver." *Id.*

[1] Weber claims a right to counsel under the Sixth Amendment and relies on caselaw requiring a knowing, intelligent, and voluntary waiver of that right. While he identifies no authority expressly holding that a defendant has a Sixth Amendment right to counsel at a probation-revocation hearing, we agree that waiver is "the voluntary relinquishment of a known right." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Accordingly, we assume without deciding that Weber's waiver must have been knowing, intelligent, and voluntary.

Weber argues that his waiver was not knowing or intelligent because his statements at the March 23 contested-revocation hearing suggest he did not know how to proceed, and he would have benefited from legal representation. Neither argument persuades us to reverse.

First, Weber's argument and briefing wholly fail to address the March 17 initial probation-revocation hearing during which the district court asked him whether he wanted a lawyer. The court pursued the issue, ultimately instructing Weber to apply for a public defender before his next hearing. At the beginning of the March 23 hearing, the prosecutor advised the district court that Weber did not want a lawyer. Nevertheless, the district court again informed Weber of his right to counsel; Weber responded that he wanted to represent himself. Weber's experience in prior criminal cases, and the fact he was represented by a public defender through his sentencing hearing in this case, demonstrate that he understood the benefits of representation and knew how to obtain a public defender. *Haggins*, 798 N.W.2d at 90 ("When a defendant has previously been represented by counsel, a district court can reasonably presume that the benefits of legal assistance and the risks of proceeding without it have been described to defendant in detail." (quotation omitted)). With this knowledge, Weber repeatedly told both the prosecutor and the district court that he wanted to represent himself.

Second, while it is likely that most defendants benefit from having legal representation, that is not the question when considering the validity of a waiver of counsel. Rather, the question is whether the defendant's waiver is "made with eyes open." *Camacho*, 561 N.W.2d at 173 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

This occurs when the defendant comprehends the charge they face, possible punishment or consequences, and any mitigating circumstances. *Id.* The record persuades us that Weber's waiver meets this standard. As noted above, the district court advised Weber of the alleged violations and the potential consequences, including execution of his sentence. The district court also had the prosecutor explain why they were asking for the sentence to be executed, and asked Weber multiple times if he wanted a public defender or other lawyer. Weber chose to invoke his right to represent himself. On this record, we conclude Weber validly waived his right to counsel.

II. The district court's failure to advise Weber of his right to obtain the evidence supporting revocation before the contested hearing did not affect Weber's substantial rights.

Minn. R. Crim. P. 27.04, subd. 2(1)(c), requires the district court to advise a probationer facing a revocation hearing of six enumerated rights. One of these is the right to "disclosure of all evidence used to support revocation and of official records relevant to revocation." Minn. R. Crim. P. 27.04, subd. 2(1)(c)c. Where, as here, the probationer does not object to the district court's failure to provide the enumerated advisories, we review for plain error. *State v. Beaulieu*, 859 N.W.2d 275, 281 (Minn. 2015). Under this standard, a defendant must establish (1) an error, (2) that it is plain, and (3) that affects the defendant's substantial rights. *Id.* at 279. Because all three prongs must be satisfied, we need not address all three prongs if the claim fails on the first. *See id.* And even if all three prongs are satisfied, we will only correct an error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation omitted).

Weber contends the district court violated his due-process rights by failing to advise him of one of his six enumerated rights—the right to obtain all evidence used to support revocation and official records relevant to the revocation. *See* Minn. R. Crim. P. 27.04, subd. 2(1)(c)c. Even if we assume the district court plainly erred by failing to inform Weber of this right, we are not convinced that the error affected Weber's substantial rights. Weber did not cross-examine the corrections agent but argues that if he had obtained the DOC file before the evidentiary hearing, he would have conducted an effective cross-examination that could have led to a different outcome. He asserts disclosure of the DOC file was essential because the testifying corrections agent—who was not his assigned probation officer—relied exclusively on the DOC file. We are not persuaded.

Weber violated his probation, in part, by not staying in contact with his probation officer. Accordingly, having the assigned probation officer testify would not have provided context beyond what was reported in the DOC file. And the record shows Weber was well aware of the violations described in the DOC file. They were the same violations that resulted in the first probation-violation report that was filed five months earlier. At the March 17 hearing, Weber responded affirmatively when the district court asked if he had sufficient time to review the violation report and addendum. At the March 23 hearing, the district court again stated the violation allegations. Weber does not point to any part of the corrections agent's testimony that he could have effectively challenged with contents of the DOC file. In sum, the district court's failure to advise Weber of his right to obtain evidence supporting revocation prior to the contested hearing did not affect Weber's substantial rights.

III. The district court did not abuse its discretion by revoking Weber's probation and imposing his stayed sentence.

When a defendant violates a condition of probation, the district court may revoke probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subds. 1, 3 (2022). Before doing so, 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). Whether to revoke probation is within the district court's discretion, and we will reverse a revocation only for an abuse of discretion. *Id.* at 249-50. But whether the district court made the required findings is a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In making a finding on the third *Austin* factor, district courts 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 607 (quotation omitted). Only one of the *Modtland* subfactors must exist to support revocation. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008). District courts "should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation" but instead must make "thorough, fact-specific records" and "seek to convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608.

Weber argues that his revocation must be reversed because the district court did not expressly find that the need for confinement outweighs the policies favoring probation. This argument is unavailing for two reasons. First, it ignores the fact that the court made an express finding on one of the *Modtland* subfactors, stating "it would unduly depreciate the seriousness of the violation if probation isn't revoked." The record supports this finding. It is undisputed that Weber was facing his second probation-revocation proceeding involving the same alleged violations. That Weber wholly failed to modify his conduct after his probation was reinstated in November 2022 suggests he has no intention of complying with his probation conditions.

Second, and more importantly, the district court's thorough and reflective findings demonstrate that the court considered Weber's overall failure to take advantage of the chemical-dependency treatment and other probation services he sought, and obtained access to only by virtue of having received a dispositional sentencing departure. At the time of the contested hearing, Weber had not been in contact with probation for at least five months. The district court noted that it agreed to the downward departure because it believed Weber was amenable to treatment. The district court continued:

> THE COURT: You came back on a violation in November for not doing treatment . . . .
> WEBER: Yeah.
> THE COURT: . . . and you're given some jail time. You're told to get an updated assessment, check in with your probation officer. Two pretty simple things to do, and didn't even do that. . . .
> . . . .
> THE COURT: . . . What you've done in this case since August 18th of 2022 doesn't show that you're trying. . . .

> I don't know how I can find that the policies favoring probation here outweigh the benefits of treatment. I think you need treatment. . . . [B]ut you haven't done anything to help yourself along the way. And, you know, you've been given opportunities. . . . And here we sit. You drop off the radar with your probation officer. You don't make any efforts to address your chemical dependency. . . .
>
> You're not being proactive. You're not being responsible. You know, you want me to think that you're trying and that you want this, but you haven't done anything to demonstrate that. . . . [I]t's a slap in the face to the justice system to let you continue out in the community when you've been given these opportunities and you haven't done it. . . .
>
> . . . I think it would unduly depreciate the seriousness of the violation if probation wasn't revoked here. . . .
>
> So what I'm going to do here, Mr. Weber, is I am going to revoke the stay of execution . . . .

In short, the district court's findings both explain the court's reasoning with specificity and demonstrate that its decision to revoke probation was not simply reflexive. *See Austin*, 295 N.W.2d at 251 (stating that revocation "cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that [they] cannot be counted on to avoid antisocial activity" (quotation omitted)). Because the district court made supported findings as to all three *Austin* factors, we discern no abuse of discretion in the decision to revoke Weber's probation and execute his sentence.[2]

Affirmed.

[2] Weber also argues that the record does not support a finding that the third *Austin* factor is met. But he does not provide any supporting analysis or legal authority, thereby forfeiting this argument on appeal. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).