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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1284**

State of Minnesota,
Respondent,

vs.

Joseph Stanley Schmidtbauer,
Appellant.

**Filed March 29, 2011
Affirmed
Lansing, Judge**

Itasca County District Court
File No. 31-CR-07-2303

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly,
Judge.

UNPUBLISHED OPINION

LANSING, Judge

Following a probation-revocation hearing at which Joseph Schmidbauer admitted to violations of his probationary conditions, the district court executed Schmidbauer's stayed sentence. On appeal, Schmidbauer challenges the district court's findings on the need for confinement and the lack of findings to justify a durational departure on sentencing. Because sufficient evidence supports the district court's finding that confinement was necessary to protect public safety and the sentence was within the guidelines range and not a departure, we affirm.

FACTS

Joseph Schmidbauer pleaded guilty in November 2007 to a charge of first-degree controlled substance crime. The charge was based on evidence obtained from the execution of a search warrant at Schmidbauer's residence. The search produced methamphetamine, drug paraphernalia, and a Remington rifle. The amended complaint included a felon-in-possession-of-firearm charge that was dismissed as part of Schmidbauer's plea agreement with the state. Schmidbauer admitted to possessing marijuana, methamphetamine, other drugs, drug paraphernalia, and to giving people drugs in exchange for work on his farm.

Schmidbauer was sentenced in April 2008. The guidelines sentence for Schmidbauer's first-degree controlled substance conviction ranged from 138 months to 192 months in prison, with a presumptive duration of 161 months. This range was based on the severity level of the offense and Schmidbauer's nine criminal-history points.

Under the plea agreement, the state and Schmidbauer jointly recommended a stayed 192-month sentence, subject to ten years of probation that required, among other conditions, twelve months of jail time, abstention from drug and alcohol use, and random drug testing. After a careful inquiry, the district court accepted the plea agreement and imposed the jointly recommended sentence. Because of a medical condition, part of Schmidbauer's one-year jail term was served through electronic home monitoring.

About two years after Schmidbauer completed his jail term, and while he was still on supervisory probation, corrections officers received a report of Schmidbauer's suspected drug use and other illegal activity. On February 16, 2010, a corrections agent conducted a field visit at Schmidbauer's home. The agent, accompanied by police officers, confronted Schmidbauer after he returned to his home, and the officers determined that he was in possession of methamphetamines and marijuana. Schmidbauer also admitted that he had additional marijuana in the car that he had driven to his home. A urine sample obtained from Schmidbauer tested positive for marijuana and methamphetamines. Schmidbauer later signed a statement admitting that he had been using methamphetamines and marijuana for three months preceding the February field visit.

At the probation-violation hearing, Schmidbauer admitted that he had violated the conditions of his probation and that the violations were intentional and without excuse. To determine the consequences for the violation, the court heard testimony from the corrections agent who was currently supervising Schmidbauer, the corrections agent who had previously supervised Schmidbauer, a dispositional advisor employed by the public

defender, three people who presented evidence of Schmidtbauer's positive interaction with his friends and neighbors, and from Schmidtbauer.

At the conclusion of the evidentiary hearing, the district court found that Schmidtbauer had intentionally and without excuse violated the conditions of his probation and that his need for confinement outweighed the policies favoring continued probation. The district court revoked Schmidtbauer's probation and executed his sentence, with credit for the time that he had already served.

DECISION

I

We first address whether the district court abused its discretion by determining that the need for confinement outweighed the policies favoring probation. The district court has broad discretion when determining whether there is sufficient evidence to revoke probation. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). We will not reverse a district court's decision absent a clear abuse of that discretion. *Id.* Before revoking 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 decision to revoke probation 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." *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted).

At the revocation hearing, the district court made findings on each of the *Austin* requirements. Schmidtbauer concedes on appeal that he violated his probation by using drugs. Although he admitted at the revocation hearing that his violations were intentional and inexcusable, he argues on appeal that the evidence is insufficient to support this finding and that the evidence is also insufficient to support the determination that the need for confinement outweighs policies favoring probation.

Schmidtbauer's admission, in addition to the testimony at the revocation hearing, supports the finding that his probation violations were both intentional and inexcusable. Schmidtbauer admitted to using drugs from November 2009 to the date of the field visit on February 16, 2010. He initially said that he resumed using drugs because he was struggling with his mother's Alzheimer's disease and her eventual death. He acknowledged that he resorted to using drugs without seeking help from his probation officer. He later testified that he knew that a condition of his probation was not to use drugs and that he had used drugs intentionally and without a good excuse.

In specifically rejecting Schmidtbauer's claim that his mother's illness was a good excuse for resumed drug use, the district court observed that Schmidtbauer told a probation agent at the time of his sentencing that he did not visit his mother, he knew treatment was available to him because he had previously attended four or five chemical-dependency programs, and he had been dishonest in his 2007 chemical-dependency assessment, which resulted in a conclusion that he was not chemically dependent. Sufficient evidence supports the district court's finding that Schmidtbauer's drug use while on probation was intentional and inexcusable.

Schmidtbauer's second challenge to the district court's revocation findings is directed to the issue of whether the need for confinement outweighed the policies favoring probation. This requirement is satisfied if "confinement is necessary to protect the public from further criminal activity by the offender; or . . . it would unduly depreciate the seriousness of the violation if probation were not revoked." *Austin*, 295 N.W.2d at 251 (quotation omitted).

In determining that Schmidtbauer's need for confinement outweighed the policies favoring probation, the district court relied in part on testimony from Schmidtbauer's supervising corrections agent to conclude that confinement was necessary to protect the public. The agent testified that Schmidtbauer had not taken probation seriously, had not taken responsibility for his actions, and previously had opportunities to address his chemical-dependency issues but did not. The agent further testified that Schmidtbauer was a risk to himself and the community because of his previous felony convictions, eight of which were drug offenses; because he had been found in possession of a firearm while using drugs; and had admittedly distributed drugs to others in the community. Additionally, the probation agent supervising Schmidtbauer when he was on electronic monitoring, testified that Schmidtbauer had not taken the restrictions seriously and had pushed the limits of the monitoring.

The district court also considered Schmidtbauer's extensive criminal history, which included twenty-nine offenses, ten of which were felonies; that the underlying behavior that led to the original charges was Schmidtbauer's admitted use of methamphetamine and providing it to those who worked for him; and that on the day of

the field visit he was driving a vehicle while both using and in possession of methamphetamine and marijuana. The district court observed that Schmidtbauer had participated in numerous treatment programs and admitted to being dishonest in his court-ordered, chemical-dependency evaluation at the time of his sentencing in 2008. The district court concluded that Schmidtbauer was in need of treatment that could only be effectively given while he was confined.

The record supports the finding that Schmidtbauer's confinement was necessary to protect the public and, therefore, outweighed the policies favoring probation. Because the district court's findings are substantiated by the record, we conclude that it was not an abuse of discretion to revoke Schmidtbauer's probation.

II

In an alternative argument, Schmidtbauer claims that his 192-month sentence must be corrected to the 161-month midpoint of the durational guidelines range because the district court failed to make findings to support the dispositional departure at his 2008 sentencing. This argument is puzzling and appears to be based on a tentative plea agreement that preceded the final plea agreement that was negotiated and accepted at the 2008 sentencing. We agree that the district court must state on the record, at the time of sentencing, the reasons for a sentencing departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). We also agree that the district court must provide reasons for both durational and dispositional departures. *State v. Hanf*, 687 N.W.2d 659, 665 (Minn. App. 2004). But we do not agree that application of these principles requires correction of Schmidtbauer's sentence.

The middle of the guidelines range of 138 to 192 months for the severity level of Schmidbauer's offense and his criminal-history score of nine was 161 months. Minn. Sent. Guidelines cmt. II.B.203-.204, IV, V (2006). But the duration of the sentence Schmidbauer received, 192 months, is also within the presumptive range and is not a departure. The district court's 2008 sentence was a dispositional departure, because the district court stayed the sentence on probationary conditions and did not execute the sentence. The state explained at the sentencing hearing that the recommended dispositional departure was based on Schmidbauer's past cooperation with law enforcement in prosecuting other offenses.

Schmidbauer now claims, only after his stayed sentence has been executed, that, because the district court failed to provide reasons for imposing a downward dispositional departure, the sentence must be corrected to a duration of 161 months. This argument is supported by neither logic nor law. Although the district court did not specifically identify reasons for the downward dispositional departure, this does not require that we impose a sentence of 161 months rather than 192 months. A district court's sentencing decisions on dispositional and durational departures are separate decisions. Minn. Sent. Guidelines cmt. II.D.02 (2006). Thus, an absence of specific reasons for the dispositional departure at the time of sentencing does not undermine the validity of the duration of the revoked sentence.

Furthermore, Schmidbauer was not adversely affected by the district court's failure to state specific reasons for a dispositional departure that Schmidbauer sought and from which he benefited by receiving probation rather than incarceration. *See In re*

Linehan, 557 N.W.2d 167, 170 (Minn. 1996) (stating that defendant must be adversely impacted by district court ruling in order to challenge ruling on appeal).

The law presumes that a sentence within the presumptive range is appropriate. Minn. Sent. Guidelines II.D (2006). Because the 192-month sentence was within the guidelines range, it is not a departure and does not require reasons to justify a departure. *See State v. Delk*, 781 N.W.2d 426, 428-29 (Minn. App. 2010) (emphasizing that any sentence within presumptive guidelines range is not sentencing departure). The district court did not abuse its discretion by imposing a sentence that was within the guidelines presumptive range.

Affirmed.