STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1460

State of Minnesota,
Respondent,

vs.

Timothy Joseph Crosby,
Appellant.

Filed April 26, 2011
Reversed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-09-15093

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

John J. Choi, Ramsey County Attorney, Dawn R. Bakst, Assistant County Attorney, St. Paul, MN 55102 (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, Kathryn Lockwood, Certified Student Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

In this appeal from the district court's revocation of his probation, appellant argues that the district court (1) erred in finding that he violated a condition of his probation,

(2) erred by revoking his probation in the absence of an intentional or inexcusable violation, and (3) violated his right to due process and equal protection by revoking his probation because of his inability to pay the cost of inpatient sex-offender treatment. Because we conclude that there is not clear and convincing evidence that appellant violated a probation condition, we reverse.

FACTS

Based on two incidents in early 2009, appellant Timothy Crosby was charged with using a minor in a sexual performance, solicitation of a minor to practice prostitution, and hiring a minor to engage in prostitution. Crosby pleaded guilty to using a minor in a sexual performance. In exchange, the state agreed to dismiss the two other charges and to recommend a guidelines sentence. Although Crosby committed violent and sexual crimes in the past, all of the prior offenses occurred during the 1970s and 1980s and were not included in the calculation of Crosby's criminal-history score. *See* Minn. Sent. Guidelines II.B.1.f (2008) (providing for 15-year decay period). Crosby's presumptive sentence, therefore, was a stayed 24-month sentence. *See* Minn. Sent. Guidelines IV (2008). The district court imposed the presumptive sentence and placed Crosby on probation for ten years. The district court also imposed several conditions of probation, including a one-year jail term and compliance with appropriate sex-offender treatment as "directed by probation."

Several months into Crosby's jail term, his probation officer directed him to participate in an assessment by Project Pathfinder to determine his appropriateness for its outpatient program. The Project Pathfinder evaluator concluded that Crosby is not an

appropriate candidate for their outpatient treatment and recommended that Crosby "participate in inpatient sexual offender treatment which can provide the necessary support and structure." Upon receiving Project Pathfinder's evaluation report, Crosby's probation officer filed a probation-violation notice that stated, "Crosby has violated the terms and conditions of probation" by failing "to enter and successfully complete sex offender treatment in that Ramsey County Community Corrections referred Mr. Crosby for outpatient sex offender specific treatment at Project Pathfinders" but Project Pathfinders "informed Ramsey County Community Corrections that Mr. Crosby would not be accepted into their program."

Crosby denied the violation and requested a contested probation-revocation hearing. The hearing focused on the need for and the feasibility of Crosby obtaining inpatient treatment. Crosby's probation officer testified that Crosby was willing to participate in treatment but the cost of the only inpatient program that is available in the community is $3,000 per month, an amount that Crosby acknowledges he cannot afford and Ramsey County will not pay. Crosby's probation officer also testified that it would "[a]bsolutely not" be possible to supervise Crosby on probation "without treatment intervention."

In a written order, the district court found that Crosby violated his probation by failing to complete inpatient sex-offender treatment, that the lack of funding for inpatient treatment justified revocation even though the violation was "not due to [Crosby's] actions," and that the need for Crosby's confinement outweighs the policies favoring

probation. The district court revoked Crosby's probation and executed his sentence. This appeal follows.

D E C I S I O N

Before revoking probation, a district court must first determine (1) whether a specific condition of probation was violated and (2) whether that violation was intentional or inexcusable. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). If the district court finds clear and convincing evidence of an intentional or inexcusable violation, the district court also must evaluate whether the need for confinement outweighs the policies favoring probation. *Id.*; *see* Minn. R. Crim. P. 27.04, subd. 2 (permitting probation revocation on finding clear and convincing evidence of probation violation). A district court has broad discretion when determining whether there is sufficient evidence to revoke probation. *Austin*, 295 N.W.2d at 249-50. On appeal, we will not disturb that decision absent a clear abuse of that discretion. *Id.*

Crosby argues that there is not clear and convincing evidence that he violated the conditions of his probation by failing to participate in inpatient sex-offender treatment. We agree. "[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). The district court found that Crosby violated the probation requirement that he "complete an inpatient sexual treatment program." But the record does not indicate that the district court or probation ever imposed this requirement. At sentencing, the district court ordered Crosby to "comply with any appropriate sex

offender treatment that is directed by probation." The record establishes that Crosby's probation officer directed him to submit to the evaluation by Project Pathfinder. Crosby complied with that direction. There is no record evidence that Crosby's probation officer ever directed him to enter and complete inpatient sex-offender treatment. To the contrary, the record reflects that Crosby's probation officer requested revocation of his probation almost immediately after learning that Crosby would not be accepted into Project Pathfinders' outpatient program because she viewed his failure to be accepted by that program as the violation. By the time of the contested hearing, the focus of the parties was on Crosby's inability to participate in inpatient treatment in the community because of the cost.

The state argues that reversal of the district court's decision is not warranted because Crosby knew, based on the probation-revocation proceedings, that he was expected to participate in inpatient treatment. We disagree. First, the district court did not make any such finding. Second, any knowledge Crosby may have acquired during the probation-revocation proceedings is not the same as receiving direction from the probation officer or the district court that he must complete inpatient treatment to maintain his probation status in the first instance. *See id.* (stating that a violation must be based on a condition "actually imposed," so "[t]he fact that a probationer is aware of or believes something to be a condition of probation does not necessarily make it so"). Because the sole basis for the district court's determination that Crosby violated his probation was his failure to comply with an inpatient-treatment requirement that was

never imposed, we conclude that the record lacks the requisite clear and convincing evidence of a probation violation.

We observe that this conclusion may appear to elevate form over substance. But the three-part probation-revocation analysis is grounded in fundamental due-process concerns. *Modtland*, 695 N.W.2d at 605 (stating that *Austin* was "grounded in United States Supreme Court precedent establishing that defendants must be afforded procedural due process when courts revoke . . . probation"). Due process requires that individuals be given fair warning of those acts that may lead to a loss of liberty, "whether the loss of liberty arises from a criminal conviction or the revocation of probation." *Ornelas*, 675 N.W.2d at 80. This is particularly true when a probation violation is based on noncriminal conduct. *See id.* (stating that when the acts prohibited by probation conditions are not criminal, due process mandates that the probationer not be subjected to forfeiture of his liberty for those acts unless he is given fair warning). Crosby cannot be deprived of his conditional liberty for failing to complete inpatient sex-offender treatment when he was not given fair warning that he could lose his liberty for that failure. Because we reverse the district court's revocation based on the lack of evidence of a probation violation, we decline to address Crosby's other arguments.

Reversed.