STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1938

State of Minnesota,
Respondent,

vs.

Adam Bryan Sowada,
Appellant.

Filed July 29, 2013
Affirmed
Cleary, Judge

Swift County District Court
File No. 76-CR-09-102

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

Robin Finke, Swift County Attorney, Danielle Olson, Harry D. Hohman, Assistant County Attorneys, Benson, Minnesota (for respondent)

Gregory K. Larson, Little Falls, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Cleary, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CLEARY, Judge

Appellant challenges the district court's determination that he violated his probation, arguing that the court should have granted a continuance; that he was denied his right to assistance of counsel; and that the court failed to make proper findings. We affirm.

FACTS

In August 2009, appellant Adam Bryan Sowada pleaded guilty to third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2008). He was sentenced to serve 150 days in jail, adjudication was stayed, and he was placed on supervised probation for five years. As one of the conditions of his probation, he was ordered to complete a sex-offender treatment program.[1] Appellant was represented by an attorney during the proceedings.

In October 2011, a probation-violation report was filed with the court stating that appellant had failed to complete the treatment program. Appellant had been terminated from the program because he had excessive absences and had failed to make adequate progress. At a probation-violation hearing in January 2012, appellant's probation was extended to January 2017, and he was ordered again to successfully complete a treatment program.

[1] Appellant was also charged with and pleaded guilty to the same offense in Morrison County. During the relevant times, appellant had similar violations pending before the Morrison County district court.

In May 2012, another probation-violation report was filed with the court stating that appellant had again failed to complete the treatment program. Appellant had been terminated from the program due to excessive absences and because his therapist was concerned about his dishonesty and his commitment to making lifestyle changes. A hearing was scheduled for June 14, 2012. Appellant requested a continuance because he had "important family issues going on" on June 14. The court granted the continuance, and the hearing was rescheduled for July 19, 2012. On July 9, 2012, appellant requested another continuance, noting that he had a pending probation violation in Morrison County for the same conduct. He also stated that he did not have a lawyer. The court denied appellant's continuance request. During the hearing on July 19, the following exchange took place between appellant and the court:

> THE COURT: [Y]ou've been charged with violating probation for not completing the sex offender treatment program, and you were given a statement of your rights today. Did you read that over?
> APPELLANT: Yes.
> THE COURT: Okay. One of your rights is the right to have an attorney, including a court-appointed attorney if you can't afford one. Do you want time to talk to an attorney?
> APPELLANT: Well, I – I wouldn't have enough money to even afford an attorney and stuff.
> THE COURT: Do you want to apply for a public defender?
> APPELLANT: I wouldn't even – I wouldn't qualify for it because I make too much.
> THE COURT: Okay. Well, you're – you have the right to apply for one, and then I could review the affidavit and see if you qualify. But why do you say you would not qualify?
> APPELLANT: I just – like I tried like in Morrison County and stuff, and they just said I wouldn't[.]
> THE COURT: Okay. You tried recently.
> APPELLANT: Yeah, like when I had court there like two or three weeks ago.

> THE COURT: What was that for?
> APPELLANT: The same thing.
> THE COURT: All right. Well, on this matter, you stated on the Statement of Rights form that you're going to deny the probation violation. Is that right?
> APPELLANT: Yes.
> THE COURT: Okay. Then I will set this on for a hearing. And you do have the right to represent yourself; but as I indicated earlier, if you – it might be – or it would be helpful for you to have an attorney to represent you.

On the statement-of-rights form that appellant signed on July 19, he denied the probation violation and requested a hearing for another day. He also indicated that he gave up his right to an attorney and would represent himself. The court scheduled a contested probation-violation hearing for July 27, 2012.

At the hearing, the following exchange took place between appellant and the court:

> THE COURT: [Y]ou've been charged with violation of probation. You were previously advised of your rights, including the right to have an attorney. And do you wish to proceed today without an attorney?
> APPELLANT: No. I talked to an attorney like mid – end of this – end of last week and stuff, and then he tried to call and get it rescheduled so he could be here, but they wouldn't let him reschedule it.
> THE COURT: Who's your attorney?
> APPELLANT: Dan Eller.
> THE COURT: So Mr. Eller called to reschedule this?
> APPELLANT: Yes, he called.

The court asked the assistant county attorney if she knew about an attorney calling to reschedule on appellant's behalf. She stated that the county attorney's office had not been contacted and also that no certificate of representation had been filed. The court stated that the hearing would proceed. Before the assistant county attorney could begin,

appellant's mother addressed the court. She explained that she had been communicating with Attorney Eller, that he had contacted the county attorney's office, that the office would not reschedule the hearing, and that Attorney Eller was unavailable on the day of the hearing. The court granted a recess so that the assistant county attorney could double-check that no one in her office had been contacted by Attorney Eller. After the recess, the assistant county attorney stated, "I spoke with both secretaries at my office. They've indicated no one has contacted our office regarding [appellant's] file. I spoke with the county attorney. He indicated he has not spoke[n] with anybody as to this file or any request for a continuance." She also stated that court administration had not received a call regarding appellant's case. The court again stated that the hearing would proceed.

Appellant's probation officer and therapist testified for the state. Appellant and his mother testified on appellant's behalf. The court found that appellant was in violation of his probation and that there was "no reasonable justification for violating probation." The court revoked the stay of adjudication, converted it to a stay of imposition, and ordered appellant to serve 30 days in jail, register as a predatory offender, and submit a DNA sample. The court also extended appellant's probation to July 27, 2017. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by not granting a brief continuance when his purported counsel was not present, compelling him to go forward

without counsel.[2] The decision whether to grant or deny a continuance lies within the discretion of the district court. *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984). To determine whether the court abused its discretion, we examine "whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial." *State v. Vance*, 254 N.W.2d 353, 358–59 (Minn. 1977).

Appellant contends that, because the court did not grant a continuance, he was denied the opportunity to "bring in his witnesses, both medical and non-medical, family and otherwise, as well as people from his employment, to verify that there were substantial and mitigating circumstances relating to his back and his health that resulted in some or all of the absences and develop exculpatory facts." But appellant did present evidence at the hearing, in the form of medical documents and testimony, in support of his argument that his health problems were the reasons for his absences from the treatment program.

Appellant knew in June at the latest that he was charged with violating his probation. He was granted one continuance from the court and had until the end of July to prepare for his probation-violation hearing. He was denied a second continuance in early July, but he did not attempt to retain a private attorney until shortly before the revocation hearing. Despite not being granted a continuance at the revocation hearing, he had an opportunity to present evidence and testimony supporting his arguments. Appellant was not so prejudiced in preparing or presenting his defense as to materially

[2] We determine that the court's denial of a continuance is implicit in its decision to proceed with the hearing.

affect the outcome of the hearing, and the court did not abuse its discretion by denying a continuance on the day of the revocation hearing.

II.

Appellant also argues that he did not forfeit his right to counsel. He claims that he did not engage in extremely dilatory conduct or attempt to manipulate the court process in any other way. We review a district court's finding that a defendant has forfeited or waived his right to counsel under a "clearly erroneous" standard of review. *State v. Krause*, 817 N.W.2d 136, 144 (Minn. 2012) (forfeiture); *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009) (waiver). The United States and Minnesota Constitutions guarantee a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel attaches at the "critical stages" of criminal proceedings. *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006). Notably, "a defendant is entitled to representation at a probation revocation hearing." *State v. Ferris*, 540 N.W.2d 891, 893 (Minn. App. 1995).

After the assistant county attorney confirmed that her office had not been contacted by appellant's purported attorney and that no certificate of representation had been filed, the court proceeded with the hearing with appellant appearing pro se. Although the district court did not make explicit findings, the court's finding that appellant waived his right to counsel is implicit in its decision to go forward with the revocation hearing. Appellant argues only that he did not forfeit his right to counsel by engaging in extremely dilatory conduct, but ignores the fact that the right to counsel may be relinquished in ways other than through extremely dilatory conduct. "Though the

right to counsel is a constitutional requirement, it may be relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *Jones*, 772 N.W.2d at 504.

Written Waiver

"Waiver is the voluntary relinquishment of a known right." *Id.* Waiver of a constitutional right must be knowing, intelligent, and voluntary. *State v. Osborne*, 715 N.W.2d 436, 443–44 (Minn. 2006). When a defendant initially appears in a probation-revocation proceeding, the court must inform the defendant of the following: (1) that he is entitled to counsel and that, if he is financially unable to pay for counsel, counsel will be provided for him; (2) that he has the right to a revocation hearing; (3) that all evidence supporting revocation and all official records relevant to revocation will be disclosed to him; (4) that he will have an opportunity to present evidence and witnesses; (5) that he will have an opportunity to present mitigating evidence; and (6) that he may appeal a decision to revoke probation. Minn. R. Crim. P. 27.04, subd. 2(1)(c).

Although there was a written waiver of counsel here, the waiver was not knowing, intelligent, and voluntary. When appellant appeared on July 19, he signed a statement-of-rights form indicating that he understood that he had the rights enumerated and that he gave up his right to an attorney and would represent himself. He told the court that, although he could not afford an attorney, he did not qualify for a public defender. At the revocation hearing, however, appellant stated that he did not want to proceed without an attorney and that he had an attorney representing him. Appellant did not make a knowing, intelligent, and voluntary waiver of his right to counsel.

Forfeiture by Extremely Dilatory Conduct

"Extremely dilatory conduct" can result in a defendant forfeiting his right to counsel, even if the court did not conduct a waiver colloquy with the defendant. *Jones*, 772 N.W.2d at 505. Appellant claims that he did not commit extremely dilatory conduct or attempt to manipulate the court process. Appellant knew the date of his revocation hearing. His hearing was originally scheduled for June, but he requested and was granted a continuance until July. He requested and was denied a second continuance in July. At the hearing on July 19, he was warned by the court that it would be helpful to be represented by an attorney. He refused to apply for a public defender, telling the judge that he would not meet the requirements, even after the judge asked him if he wanted to talk to an attorney and whether he wanted to apply for a public defender. Appellant appeared for the revocation hearing without an attorney and with no reasonable explanation for why his attorney was not there or why his attorney had not contacted the county attorney's office or the court. Although he engaged in dilatory tactics, appellant's behavior here was not extreme, and he did not forfeit his right to counsel.

Waiver by Conduct

"Waiver by conduct applies to those defendants who voluntarily engag[e] in misconduct knowing what they stand to lose [but] are not affirmatively requesting to proceed *pro se*." *Id.* (alterations in original) (quotation omitted). A defendant's refusal to apply for a public defender or obtain private counsel can demonstrate waiver of the right to counsel. *See Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002).

Appellant learned about the probation-violation hearing in June at the latest. In June he requested a continuance, which the court granted. In July he requested another continuance, which the court denied. At the hearing on July 19, appellant did not have an attorney. The court warned appellant that it would be helpful for him to have an attorney. After appellant stated that he could not afford an attorney, the court asked appellant if he wanted to talk to an attorney and whether he wanted to apply for a public defender. At the revocation hearing, appellant claimed that he had an attorney and that his attorney had contacted the county attorney's office to reschedule the hearing, but the county attorney's office had not received any information from the purported attorney, nor had a certificate of representation been filed. Other than the word of his mother, who informed the court that she had spoken with the purported attorney, appellant could not substantiate his claims that he was represented by an attorney and that the attorney had requested that the hearing be rescheduled.

Appellant waived his right to counsel by his conduct. He had been informed of his right to counsel; warned by the court that an attorney would be helpful; and asked by the court whether he wanted to apply for a public defender. Further appellant did not have a reasonable excuse for why the county attorney's office had not received any communication from his purported attorney. The court's implicit finding that appellant waived his right to counsel was not clearly erroneous.

III.

Appellant also argues that the court erred by not making required findings when revoking the stay of adjudication. *See State v. Austin*, 295 N.W.2d 246, 250 (Minn.

1980) (holding that "before probation [is] revoked, 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"). The state argues that, although the court did not expressly address the *Austin* factors, the record nonetheless supported the revocation.

When a probation-violation proceeding results in the imposition of intermediate sanctions, rather than in the revocation of probation and execution of a defendant's sentence, the *Austin* analysis does not apply. *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008). "[T]he imposition of intermediate sanctions for probation violations will be reviewed to determine whether the district court abused its discretion." *Id.* In order to impose intermediate sanctions, the court must "determine whether there is clear and convincing evidence that a condition of probation has been violated." *Id.*; *see also* Minn. R. Crim. P. 27.04, subds. 2–3.

The result of appellant's revocation hearing here was that his stay of adjudication was revoked and converted to a stay of imposition. He was ordered to serve 30 days in jail, register as a predatory offender, and submit a DNA sample. The court also extended appellant's probation. Because appellant's probation was not revoked and his sentence was not executed, the district court was not required to make specific findings on the *Austin* factors.[3]

[3] Appellant suggests that, although findings were not required under *Austin*, "it would seem appropriate for [there] to be findings even though the sentence was not executed." We decline to impose this obligation when no such duty currently exists.

At the revocation hearing, appellant's therapist testified that appellant was terminated from the treatment program due to excessive absences and dishonesty. Appellant acknowledged the absences, but presented evidence to show that his absences were due to medical issues. The medical evidence that he presented was dated after his termination from the program, and he did not provide contemporaneous support for his absences. The state presented clear and convincing evidence that appellant violated a condition of his probation, and the district court did not abuse its discretion by imposing intermediate sanctions.

IV.

Finally, appellant argues that the district court abused its discretion by not asking him "to fill out an application for a public defender to determine whether or not his financial situation would allow him to pay the public defender's office for their services." This argument is unpersuasive. Appellant bears the burden of demonstrating that he is financially eligible for a public defender. *Jones*, 772 N.W.2d at 503. The court asked appellant if he wanted to apply for a public defender, and appellant declined based on his recent disqualification from public-defender services. The court did not abuse its discretion by not pursuing the matter further.

Appellant also alleges that the district court abused its discretion by failing to inform him about certain practices and customs in Minnesota district courts regarding obtaining a public defender; by refusing to appoint a public defender; and by refusing to utilize certain technology to later recall witnesses who had been subpoenaed for the revocation hearing. Because appellant does not support these allegations with argument

or citation to legal authority, we do not address them. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006) ("If the brief does not contain an argument or citation to legal authority in support of the allegations raised, the allegation is deemed waived."), *review denied* (Minn. Jan. 24, 2007).

Affirmed.