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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2164**

State of Minnesota,
Respondent,

vs.

Tim Davin Dortch,
Appellant.

**Filed December 9, 2013
Affirmed
Ross, Judge**

Ramsey County District Court
File No. 62-CR-09-5319

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Tim Dortch was on probation in lieu of a 49-month prison sentence when he refused to sign a release of medical information to allow his psychiatrist to share

information with his probation officer. The state accused him of violating a special probation condition that he cooperate with medical personnel and with the court, and the district court revoked his probation. Dortch maintains that the state did not provide clear and convincing evidence that he violated the special condition, that the condition that he sign a release of information was not imposed by the court, and that the district court erred by finding that he violated a condition that was never alleged or argued at his revocation hearing. Because the district court put Dortch on notice of the condition and the evidence supports the revocation based on Dortch's failure to meet the condition, we affirm.

FACTS

Tim Dortch pleaded guilty to second-degree assault in April 2010. The district court granted Dortch's motion for a downward-dispositional departure and sentenced him to 49 months' imprisonment and a \$1,000 fine, staying execution of both contingent on his meeting probation conditions for seven years. The district court ordered Dortch to comply with routine terms and conditions of probation, and because his criminal behavior arose from mental-health problems, it also imposed special conditions. The special conditions required Dortch to cooperate with doctors, take all prescribed medication, and remain law-abiding. The district court orally ordered Dortch to "cooperate with probation in all respects." Although the probation officer attempting to memorialize these conditions in writing omitted the condition that Dortch "cooperate with probation," the condition was included in two amended orders after Dortch violated his probation in 2011 and again in 2012.

In June 2012 Dortch met with his probation officer, Marc Peterson. Peterson asked Dortch to sign a release of information allowing his psychiatrist to speak with probation. Dortch reportedly responded, "Probation ain't got no business with my mental health." Peterson then informed him that failing to sign the release could violate his probation, so Dortch promised to sign it. When Peterson later called Dortch's psychiatrist, however, the psychiatrist refused to speak about Dortch because Dortch had still refused to sign.

Peterson filed a probation-violation memorandum alleging that Dortch had "failed to comply with the special condition of cooperating with counselors and Doctors, as well as the court" by refusing to sign the release. Dortch was arrested three days later. He was carrying a 13-inch knife with an 8-inch blade, violating a St. Paul ordinance.

The district court held a probation revocation hearing at which the state asked the court to revoke Dortch's probation for the reason stated in the memorandum and because he had failed to remain law-abiding. The state presented two pieces of evidence supporting its allegation that Dortch had failed to cooperate with doctors. First, Peterson testified that the psychiatrist, Dr. Yoshiko Hapke, told him that she unsuccessfully "tried to get [Dortch] to sign a release of information." Second, Peterson relayed what Dr. Hapke wrote to him after he called her a second time:

When I met with Mr. Tim Dortch in my clinic on 07-16-2012, I asked him specifically to talk to you, he refused repeatedly. He then wanted to sign [a release of information] to you, so I explained to him if he will sign [a release of information], then I will talk to you, so he refused to sign it.

In summary,
I am not allowed to talk to you, because Mr. Dortch refused.

Dr. Hapke did not testify at the hearing, and Dortch testified that Dr. Hapke advised him not to sign the release. Peterson testified that he had directed Dortch to sign the release and informed Dortch that refusing would constitute a probation violation. The state also called the arresting officer to testify about the law-abiding violation. He testified to the size of the knife and the state introduced photographs of it.

The district court framed the issue this way: “Has there been clear and convincing evidence that Mr. Dortch failed to cooperate with probation by not signing releases of information.” The court found that Dortch failed to cooperate with probation by refusing to sign the release. The court explained that, by refusing, “You’re not doing what Mr. Peterson tells you you have to do to cooperate with probation.” The district court also found that violating the St. Paul knife ordinance violated the law-abiding condition of probation. It found both of these violations were unexcused, and it revoked Dortch’s probation and executed his prison sentence.

Dortch appeals.

DECISION

Dortch challenges the district court’s decision to revoke his probation. We will reverse a district court’s decision to revoke probation only if the court acted beyond its discretion. *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). It acts beyond its discretion if it misapplies the law. *Johnson v. State*, 733 N.W.2d 834, 836 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). Before a district court can revoke probation, it must specify the condition violated, find the violation intentional or inexcusable, and “find that [the] need for confinement outweighs the policies favoring probation.” *Austin*,

295 N.W.2d at 250. Those three findings must appear on the record. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). Dortch contests only the district court’s finding on the first prong of the *Austin* test—that he violated a specific condition of probation.

Dortch argues that the district court cannot revoke his probation based on the alleged failure-to-sign-a-release violation. Both parties assume that the district court found that Dortch violated the condition that he cooperate with medical personnel. The state maintains that by refusing to sign the release, Dortch was limiting Dr. Hapke’s treatment by not allowing the doctor access to information from probation. In support, it asserts that Dr. Hapke requested the information to help with treatment. Both assertions are mistaken. The email from Dr. Hapke to Peterson indicating that she could not talk about Dortch with Peterson does not suggest that Dr. Hapke requested that Dortch sign a release. The district court reasonably surmised that the email is instead Dr. Hapke’s response to *the probation officer’s* request for information. The doctor indicated that when she told Dortch the consequences of signing the release, he refused despite having initially indicated that he would sign it. If the state’s alleged reason for requiring the release—to aid Dr. Hapke by providing *her* with additional information about Dortch—was the true objective, it could have been accomplished without a release. The record includes no evidence, let alone clear and convincing evidence, that Dortch failed to cooperate with doctors.

But contrary to the assumption of both parties, the district court never found that Dortch failed to cooperate *with doctors*. It specifically found that there was “[a]bsolutely” “clear and convincing evidence that Mr. Dortch failed to cooperate *with probation* by not

signing releases of information.” (Emphasis added.) So we must decide whether this is a legitimate ground for the revocation. Specifically, we must decide whether the probation officer’s requirement that Dortch sign a release of information constitutes a new, stand-alone condition improperly imposed, or instead merely implements or administers the district court’s order. “Determining conditions of probation . . . cannot be delegated to executive agencies.” *State v. Henderson*, 527 N.W.2d 827, 829 (Minn. 1995). But implementing conditions can properly be delegated. *Id.* Probation officers can set appropriate levels of supervision and administer probation conditions. *Id.*; see also Minn. Stat. § 383A.404, subd. 5(1) (2012) (explaining that the Ramsey County Community Corrections Department has the duty “[t]o supervise persons placed on probation”).

We hold that the probation officer’s requirement that Dortch sign the release administers a judicially imposed condition rather than imposes a new, probation-officer created condition. The probation officer was tasked with supervising Dortch, and Dortch was required to cooperate with the supervision. Supervising Dortch required the medical release so the officer could ensure that Dortch was complying with two undisputedly valid conditions of probation: that Dortch take his medication and that he cooperate with medical personnel. Without a release allowing the psychiatrist to speak with the probation officer, the probation officer could not ensure Dortch’s compliance. Officer Peterson expressly warned Dortch that failing to sign a release would lead Peterson to report a violation. We hold that the condition was judicially imposed and enforceable.

We must next decide whether Dortch’s due process rights were violated when the state obtained the revocation without first alleging the precise condition violated. Due process requires that a probationer have fair warning of any act that may deprive him of liberty. *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004). A probationer must also “be given an opportunity to show that even if a condition of probation was violated, mitigating circumstances exist” to demonstrate that the violation does not warrant revocation. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008). The probation revocation summons must include “the probationary terms allegedly violated” and “a factual statement supporting probable cause to believe the probationer violated the terms of probation.” Minn. R. Crim. P. 27.04, subd. 1(2)(b), (c). The summons satisfied these due process requirements. It alleged that Dortch violated “the special condition of cooperating with counselors and Doctors, as well as the court.” It also explained that the specific act underlying the violation was Dortch’s refusal to sign a release to allow his doctor to talk with his probation officer. Dortch was given notice that his conduct was uncooperative with “the court,” not just with medical workers. Specifying the alleged misconduct—Dortch’s failure to sign a release despite being told to do so by his probation officer—gave Dortch sufficient notice to prepare his defense and present potential mitigating circumstances to the court. Indeed, after receiving the notice, Dortch gave several reasons why he felt he should not sign the release, and he expressed his post-violation willingness to sign.

We hold that the district court did not abuse its discretion by revoking Dortch's probation based on his failure to sign a medical release form. We therefore need not consider the state's additional argument that Dortch's other violation—failing to remain law-abiding—provides an independent basis to revoke his probation.

Affirmed.