STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2192

State of Minnesota,
Respondent,

vs.

Clarence Bruce Beaulieu,
Appellant.

Filed September 9, 2013
Affirmed
Hooten, Judge

Polk County District Court
File No. 60-CR-10-1038

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

Gregory Widseth, Polk County Attorney, Andrew W. Johnson, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Tania K. M. Lex, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kalitowski, 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

HOOTEN, Judge

Appellant challenges the revocation of his probation and execution of his sentence for first-degree burglary, arguing that the district court (1) failed to inform him of his rights under Minn. R. Crim. P. 27.04, subd. 2(1)(c); (2) failed to make sufficient findings in support of the *Austin* factors, and (3) abused its discretion by revoking his probation and executing his sentence. We affirm.

FACTS

In May 2010, appellant Clarence Bruce Beaulieu was charged by complaint with two counts of first-degree burglary, one count of gross misdemeanor violation of a domestic abuse no contact order (DANCO), and one count of gross misdemeanor domestic assault. The complaint alleged that appellant, in violation of a DANCO issued two days before and apparently under the influence of alcohol, gained entry into the apartment of his ex-girlfriend and began pushing her around. Appellant pleaded guilty to one count of first-degree burglary in exchange for dismissal of the remaining charges and a stayed guideline sentence, which represented a downward dispositional departure. Consistent with the plea agreement, appellant received a 57-month sentence, execution of which was stayed for a period of 20 years upon the condition that he serve 180 days of local incarceration and be placed on supervised probation. Conditions of probation required appellant to undergo a chemical dependency and domestic abuse assessment, refrain from possessing or consuming alcohol and controlled substances, refrain from

contacting the victim, sign a probation agreement, and remain in contact with his probation agent.

A probation violation report was filed on September 21, 2010, alleging that appellant failed to follow probationary rules by not keeping appointments with his agent and not complying with required instructions. The agent represented that appellant failed to make necessary arrangements to sign the probation agreement so that probation could be transferred to Clearwater County, where appellant was residing. A warrant was issued after appellant failed to appear at an initial hearing on October 4, 2010, and with the assistance of a public defender, appellant eventually entered an admission to the alleged violation on February 7, 2011. At a dispositional hearing on February 11, 2011, the state, noting his failure to "comply with even the most basic conditions of probation," requested execution of appellant's sentence. The district court provided the following warning to appellant:

> Now, I don't know if Clearwater is going to want to take you as a probation person or not. And if they don't, that's kind of between them and, I guess, probation over here. In any circumstance, you've got to work with probation. That means you've got to keep meetings with them, you've got to let them know what your addresses are, what your phone numbers are. If you've got a meeting and you've got to cancel it, you've got to get on the phone and call them up and you've got to tell them, "Hey, I can't make it, can I get another date?" and then you'd better make another date. And, if you forget about it, you're going to be back in front of me and [the prosecutor] is going to say, "Judge, I told you so," and I'm going to say to you, "Goodbye," and you're going to go to St. Cloud and you're going to get shipped off to one of the state correctional facilities; St. Cloud, Stillwater, wherever it happens to be. I'm not going to worry about it, [the prosecutor] isn't going to worry about it, you're the one

> who has to worry about it. Because, if you don't follow through and get these things done, you know what's going to happen.

Consistent with the recommendation of appellant's probation agent, the district court reinstated appellant's supervised probation and initial terms, and imposed 120 additional days of jail time. The district court also specifically required completion of the chemical dependency assessment during the period of confinement and completion of the domestic abuse assessment within six months. Appellant signed the probation agreement shortly thereafter.

Appellant's probation was again revoked on August 3, 2012, upon an allegation that appellant failed to keep all appointments and be truthful with his agent, and failed to complete the chemical dependency assessment. The violation report alleged that appellant's "adjustment to probation has been unsatisfactory" and explained that he failed "to report as directed." The violation report also noted that in January 2012, appellant was found "in a ditch on the side of the road" with an alcohol concentration of .30 and had not been in contact with his probation agent since March 2012. While appellant had nine previous office visits and eight collateral contacts, appellant's whereabouts were unknown at the time of the report. Despite this, the report did not recommend execution of appellant's sentence.

Appellant again obtained the services of a public defender and admitted the violations on August 13, 2012. At a disposition hearing on September 24, 2012, the district court executed appellant's 57-month sentence, with the following explanation:

> All right. Well, the Court's going to do the following, Counsel, and [appellant]. It does put the Court in a dicey position, . . . but this was a dispositional departure, he had the first probation violation, and I remember telling [appellant] exactly what [the prosecutor] said I told to him. And, quite frankly, the Court intends to follow through and execute this sentence.
>
> You were given an opportunity at time of sentencing, [appellant]; you didn't make it the first time around. Now, we're on the second probation violation and, yeah, I understand you've got a problem with the use of alcohol, and I don't disagree that you probably need inpatient treatment, but the other probation violation you admitted to was not keeping in contact with probation; not following through with your appointments. And when I sentence someone, I make it crystal clear that that's one of the obligations you got. Not following through and keeping appointments means that you're really not on probation, you're just out there as a freewheeling person. So the Court's going to make the appropriate *Austin* factors that keeping in contact with probation, not using alcohol were both sentencing conditions, you violated both of them, and the Court finds that to be intentional. And then, in the final count of weighing and balancing the public safety versus the ability for the defendant to make it in the community, weighs heavily in favor of the Court executing the sentence and the Court's going to execute that 57-months.

This appeal follows.

D E C I S I O N

I.

In support of his claim that the district court erred in executing his sentence, appellant first argues that he was denied due process under the Fourteenth Amendment. The basis for this claim is that the district court failed to inform him of his constitutional rights as set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972) and

Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973). The district court's resolution of constitutional law issues is reviewed de novo. *State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007). The interpretation of the rules of criminal procedure is also reviewed de novo. *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009).

Gagnon provided that due process mandates the same type of hearing and constitutional rights in probation revocation cases as that set forth in *Morrissey*, which involved parole revocations. *See Pearson v. State*, 308 Minn. 287, 289, 241 N.W.2d 490, 492 (1976). In *Gagnon*, after concluding that a probationer, like the parolee in *Morrissey*, was entitled to an advisory regarding his constitutional rights, the supreme court addressed the "more difficult" issue of "whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these proceedings." 411 U.S. at 783, 93 S. Ct. 1760. After reviewing the nature of a probation officer's supervisory and rehabilitative role and the underlying rationale for requiring preliminary and final revocation hearings pursuant to *Morrissey*, it was explained that "[a]t the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." *Id.* at 784–86, 1760–61. In addition to these rights, it was held that

> counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if

> the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Id. at 790, 1764. Thus, *Morrissey* and *Gagnon* establish the broad procedural and constitutional requirements attendant to probation and parole violation proceedings.

Under Minn. R. Crim. P. 27.04, subd. 2(1)(c), a defendant is entitled to an advisory of his constitutional rights at a preliminary probation violation hearing.[1] In addition, under Minnesota law, a defendant is entitled to legal representation at a probation revocation hearing. *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006); *see also* Minn. Stat. § 609.14, subd. 2 (2012) ("If such grounds are brought in issue by the defendant, a summary hearing shall be held thereon at which the defendant is entitled to be heard and to be represented by counsel."). A "failure to advise a probationer of the right to counsel mandates reversal of a probation revocation." *Kouba*, 709 N.W.2d at 304; *State v. Murray*, 529 N.W.2d 453, 455 (Minn. App. 1995) (reversing probation

[1] Under this rule, at a first appearance on a summons or warrant reporting probable cause of a probation violation, a district court is required to tell the probationer of his or her right to the following: (1) "a lawyer, including an appointed lawyer if the probationer cannot afford a lawyer"; (2) "a revocation hearing to determine whether clear and convincing evidence of a probation violation exists and whether probation should be revoked"; (3) "disclosure of all evidence used to support revocation and of official records relevant to revocation"; (4) the opportunity to "present evidence, subpoena witnesses, and call and cross-examine witnesses, except the court may prohibit the probationer from confrontation if the court believes a substantial likelihood of serious harm to others exists"; (5) the opportunity to "present mitigating evidence or other reasons why the violation, if proved, should not result in revocation"; and (6) the right to "appeal any decision to revoke probation."

revocation on the basis that the district court failed to adequately inform probationer of his right to counsel pursuant to *Gagnon* and Minn. R. Crim. P. 27.04, subd. 2).

In the instant case, while the district court did not specifically inform appellant of his rights as set forth in Minn. R. Crim. P. 27.04, subdivision 2(1)(c), appellant was represented by counsel at both hearings. Appellant cites no specific authority in support of his argument that, even though he was represented by counsel, he was deprived of due process solely because of the district court's failure to advise him of these constitutional rights. Rather, appellant received notice of the alleged probation violations and with the assistance of counsel, had the opportunity to appear and present evidence on his behalf. *See Gagnon*, 411 U.S. at 784–86, 93 S. Ct. at 1760–61. Under these circumstances, the district court may assume that appellant was adequately informed of his rights because he was represented by counsel. *See State v. Lorentz*, 276 N.W.2d 37, 38 (Minn. 1979) ("[T]he records reveal that both defendants had discussed their cases with their respective attorneys; therefore, a presumption arose that they had been fully advised of their rights.").[2] Therefore, appellant's argument that he never validly waived his *Gagnon* or

[2] Absent constitutional violations, this court has not found reversible error given substantial compliance with other rules of criminal procedure. *See, e.g.*, *State v. Worthy*, 583 N.W.2d. 270, 276 (Minn. 1998) ("[A]lthough the trial court's on-the-record inquiry regarding waiver did not include a recitation of the charges or potential punishments, it is clear that Worthy and McKinnis were in fact given counsel and then unequivocally fired their attorneys. When they did so, they were fully aware of the consequences."); *City of Lambertson v. Mickelson*, 354 N.W.2d 864, 866 (Minn. App. 1984) (affirming trial judge's decision to permit new trial without written order given substantial compliance with Minn. R. Crim. P. 26.04); *but see State v. Ulland*, 357 N.W.2d 346, 347 (Minn. App. 1984) (requiring strict compliance with Minn. R. Crim. P. 26.01, subd. 1(2)(a), which sets forth requirements when a defendant waives a jury trial on issue of guilt).

Morrissey rights is unavailing given the appointment of counsel and his opportunity to contest the revocation with the assistance of counsel.

II.

Appellant next argues that the district court failed to sufficiently analyze the *Austin* factors before revoking his probation, and that the decision to revoke probation and execute the sentence constituted an abuse of discretion. "[W]hether a lower court has made the findings required under *Austin* presents a question of law, which is subject to de novo review." *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). "The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980).

In *Austin*, the supreme court addressed "[t]he threshold question" of "what findings a trial court must make before revoking probation." 295 N.W.2d at 250. "For future guidance," *Austin* set forth "a three-step analysis which requires that before probation be revoked, the 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." *Id.* In *Modtland*, the supreme court rejected an interpretation of *Austin* permitting "a sufficient evidence exception to the requirement that courts make the requisite three findings." 695 N.W.2d at 606 (quotation marks omitted). Instead, *Modtland* "reaffirm[s] *Austin*'s core holding that district courts must make the following three findings on the record before probation is revoked." *Id.* In explaining the necessity of such a finding, *Modtland* explains:

> In making the third *Austin* finding, we emphasize that district courts must bear in mind that "policy considerations may require that probation not be revoked even though the facts may allow it" and that "[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." When determining if revocation is appropriate, courts must balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety," and base their decisions "on sound judgment and not just their will."

Id. at 606–07 (quoting *Austin*, 295 N.W.2d at 250) (citations omitted).

Austin and *Modtland* require that the district court consider whether confinement is necessary to protect the public from further criminal activity and whether refusing to revoke probation would unduly depreciate the seriousness of the violation. 295 N.W.2d at 251, 695 N.W.2d at 607. Additionally, *Austin* notes that policy considerations may require revocation when one "has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation," resulting in the conclusion that it was "not unreasonable to conclude that treatment had failed." 295 N.W.2d at 251.

Appellant asserts that the district court merely listed the *Austin* factors and found that they were satisfied, and that it "gave no rationale for its conclusion that concern for public safety outweighed the policies favoring reinstating [appellant] on probation." The district court's analysis of the first two factors, however brief, were sufficient in that there was no reasonable dispute that appellant failed to keep in contact with his agent and refrain from consuming alcohol. Since appellant advances no specific argument that the district court's findings and conclusions were insufficient with regard to the first two

Austin factors, we will address only whether the district court's findings are sufficient relative to the third *Austin* factor.

Relative to the third *Austin* factor, the district court specifically noted appellant's continuing problems with alcohol, his failure to keep his appointments with probation officers, and his repeated probation violations. Most significantly, the district court noted that in "weighing and balancing the public safety versus the ability for the defendant to make it in the community," this factor weighed "heavily in favor of . . . executing the sentence." In explaining its concerns regarding public safety, the district court explained to appellant that "[n]ot following through and keeping appointments means that you're really not on probation, you're just out there as a freewheeling person." While the district court could have set forth a more detailed and complete analysis on this final factor, we conclude that sufficient findings were made in explaining why probation was not working and why revocation of appellant's probation was appropriate under the circumstances.

III.

We also reject the argument of appellant that the district court abused its discretion in revoking his probation and executing his sentence. This was appellant's second probation hearing involving multiple probation violations, including the discovery of appellant in public while highly intoxicated and a continuing inability to refrain from the use of alcohol. In addition, there was substantial evidence that appellant failed to stay in contact with his probation officers and that his adjustment to probation was unsatisfactory. Given the fact that appellant's underlying criminal act involved the use of

alcohol, and appellant had failed to abstain from the use of alcohol, there was evidence that such failure to abstain from alcohol or otherwise cooperate with the condition of probation could affect public safety. In this regard, appellant's conduct went beyond "an accumulation of technical violations," and "demonstrate[d] that he . . . cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotations omitted); *see also State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (affirming, in consideration of public safety concerns, the revocation of probation on the basis that the probationer failed to remain in contact with his probation officers even though the probationer had committed no new crimes.)

Under these circumstances, we hold that the district court did not abuse its discretion in revoking appellant's probation and executing his sentence. Further, we conclude that the district court's findings in its consideration of the *Austin* factors are sufficient to support such revocation and execution of appellant's sentence.

Affirmed.