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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2317

State of Minnesota,
Respondent,

vs.

Shawn Michael Wills,
Appellant.

Filed October 21, 2013
Affirmed
Schellhas, Judge

Stearns County District Court
File No. 73-CR-10-1539

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

SCHELLHAS, Judge

Appellant challenges his probation revocation, arguing that the district court erred by revoking his probation because one of the three probation conditions that he allegedly

violated was never imposed by the court. Because the district court found that appellant violated two other probation conditions that were imposed by the court, we affirm.

FACTS

This appeal arises out of appellant Shawn Wills's 2011 conviction of first-degree criminal sexual conduct involving a ten-year-old daughter of a woman whom Wills dated. Wills admitted that he had a significant relationship with and sexually penetrated the victim. At sentencing, Wills moved for a downward dispositional departure and the district court granted his request, staying the presumptive 144-month sentence and imposing 30 years of supervised probation with probation conditions, orally stated on the record, that included the following: successful completion of an approved sex-offender-treatment program, as directed by Wills's probation officer, and following all recommendations; seeking assistance from a medical provider to address symptoms of depression; and completion of a polygraph test for case-management purposes.

Wills continued his relationship with the victim's mother after he began sex-offender treatment. During treatment Wills signed a statement that included the following: "*I may be terminated from the program for failure to make adequate progress. This includes . . . addressing my past and current behavior honestly.*" He also acknowledged having victimized other minors for which he had not been charged criminally. In mid-March 2012, the treatment program instructed Wills to not have contact with his ten-year-old victim's mother until he satisfied program requirements that included passing a polygraph test and adequate improvement.

On June 26, 2012, Wills admitted during treatment to having sexually abused two of his biological daughters and eight additional victims for which he was not charged. A polygraph test showed Wills to be "deceptive and untruthful with his sexual history," causing the program concern that Wills might have been withholding additional information about his sexual contact with his children or other family members. Wills also admitted that he lied to the treatment-program staff about his whereabouts and admitted to spending time with and having sexual contact with his ten-year-old victim's mother. When staff asked Wills if he used birth control, he broke his pencil in half, forcefully pushed his chair from the table, swatted his water bottle across the room, and yelled, "'Fine she's f-ck-ng pregnant! Okay! She's f-ck-ng five months pregnant!'" The treatment program terminated Wills because of his questionable amenability to treatment and his risk to the community.

A probation agent recommended that the stay of Wills's sentence be vacated based on three probation violations: "[f]ailure to complete sex offender treatment program and follow all recommendations," "[f]ailure to [s]eek assistance from medical provider to address symptoms of depression," and "[f]ailure to [c]ooperate and be truthful with probation in all matters." At Wills's probation-revocation hearing, the district court admitted copies of the treatment-program termination letter and a psychosexual report. In contrast to the psychosexual report submitted to the district court before sentencing, which reported Wills's sexual-abuse history as nonexistent, the new psychosexual report stated that Wills had an "extensive [history of] sexually abusive behavior," including his abuse of 11 different people, including two of his biological daughters—once when one

was an infant—and girls generally between ages 6 and 12. The probation agent affirmed that a "general condition" of Wills's probation was that he "cooperate with and be truthful with probation in all matters," that Wills failed to be honest, and that Wills is unamenable to probation. Wills agreed that he had failed to be honest but stated that he wanted to resume sex-offender treatment. Wills's counsel conceded that Wills had violated the probation condition that required him to seek help for depression.

The district court found that Wills intentionally and inexcusably violated three of his probation conditions by "not completing sex offender treatment," "not seeking medical treatment to address his symptoms of depression," and "not being completely honest and truthful with his probation agent." The court further found that "Wills is not amenable to treatment in the community" and that "the benefits of probation are outweighed by the risks [to] the community." The court revoked Wills's probation and committed him to the commissioner of corrections for 144 months.

This appeal follows.

D E C I S I O N

"[R]evocation should be used only as a last resort when treatment has failed." *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted). This court has previously affirmed revocations when the probationer failed to complete treatment required as a probation condition. *See State v. Rock*, 380 N.W.2d 211, 212–13 (Minn. App. 1986) (sex-offender and chemical-dependency treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (sex-offender treatment); *see also State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (chemical-

dependency treatment), *review denied* (Minn. Feb. 13, 1987); *State v. Marti*, 372 N.W.2d 755, 758–59 (Minn. App. 1985) (sexual-aggression treatment), *review denied* (Minn. Oct. 11, 1985).

"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 . . . ." *State v. Modtland*, 695 N.W.2d 602, 606–07 (Minn. 2005) (quotation omitted). Generally, "revocation followed by imprisonment should not be the disposition unless the court finds on the basis of the *original offense and the intervening conduct of the offender* that confinement is necessary to protect the public, provide correction, or avoid unduly depreciating the seriousness of the offense." *Osborne*, 732 N.W.2d at 253 (quotation omitted).

An appellate court will not reverse a district court's exercise of its "broad discretion in determining if there is sufficient evidence to revoke probation" absent "a clear abuse of that discretion." *Id.* (quotation omitted). But the district court "must make specific findings on all three *Austin* factors before revoking probation." *State v. Cottew*, 746 N.W.2d 632, 636–37 (Minn. 2008). Under *Austin*, the court must "(1) specifically identify the condition or conditions violated; (2) find that the violation was intentional or inexcusable; and (3) find that the policies favoring probation no longer outweigh the need for confinement." *Osborne*, 732 N.W.2d at 253 (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)).

Wills does not dispute the district court's findings that he intentionally and inexcusably violated his probation conditions that he complete sex-offender treatment

and seek medical treatment for his depression. Instead, Wills argues that the district court violated his right to due process by revoking his probation for "not being completely honest and truthful with his probation agent." He argues that the district court never imposed a probation condition that required him to be honest with his probation agent. Wills did not raise this issue before the district court and did not refute his probation agent's claim that Wills had been untruthful with her; in fact, as noted above, Wills agreed with his probation agent that he had been untruthful. Generally, an appellate court "is most reluctant to address issues that have not been raised at the lower courts." *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (quotation omitted). But, in *Ornelas*, the supreme court concluded that the interests of justice required it to determine whether a no-contact condition was actually imposed even though the record clearly showed that Ornelas did not raise the no-contact issue in the district court, in the court of appeals, or in his petition for review to the supreme court. *Id*. at 79−80.

In this case, we agree that the record before us does not reveal that the district court ever imposed a probation condition that Wills cooperate and be honest with his probation agent. But, arguably, the imposition of such a probation condition is implicit as part of the imposed condition that he "complete a polygraph for case management purposes." But we need not and do not reach that issue because we resolve this appeal on a different ground.

Regardless of whether Wills's failure to be honest with his probation agent violated a court-imposed condition, the district court found that he violated two other court-imposed conditions, and Wills does not challenge the court's findings that he

intentionally and inexcusably failed to complete sex-offender treatment and seek medical help for his depression. We conclude that the district court did not abuse its discretion by revoking Wills's probation based on his violations of these court-imposed probation conditions.

Affirmed.