STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0363

State of Minnesota,
Respondent,

vs.

Terry Larue Balzum,
Appellant.

Filed November 26, 2012
Affirmed
Larkin, Judge

Norman County District Court
File No. 54-K5-05-000211

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

James D. Brue, Norman County Attorney, Ada, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's revocation of his probation, arguing that the evidence was insufficient to establish that a probation violation occurred, that the

alleged violation was intentional or inexcusable, or that the need for confinement outweighs the policies favoring probation. Because the district court did not abuse its discretion in revoking probation, we affirm.

FACTS

In 2008, appellant Terry Larue Balzum was sentenced for convictions of one count of dissemination of pornographic work involving minors and three counts of possession of pornographic work involving minors. This court affirmed his conviction in an unpublished opinion. *See State v. Balzum*, No. A08-439 (Minn. App. Apr. 14, 2009). The district court stayed Balzum's prison sentences and placed him on probation. In July 2011, the district court held a contested probation-violation hearing. In a written order filed October 25 2011, the district court concluded that Balzum intentionally and inexcusably violated a condition of probation by failing to complete outpatient sex-offender treatment. The district court ordered that a disposition hearing be held before Balzum's sentencing judge. After a hearing in November 2011, the sentencing judge found that the need for Balzum's confinement outweighed the policies favoring probation, revoked Balzum's probation, and executed his prison sentences. Balzum appeals.

D E C I S I O N

When a probation violation is challenged, the state must prove the violation by clear and convincing evidence. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008). Before revoking probation, the district court must: (1) identify the specific condition that was violated; (2) find that the violation was intentional or inexcusable; and (3) find that

the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). "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." *Id.* at 249-50.

The Specific Condition Violated

Balzum contends that the district court's finding of a violation was clearly erroneous. He argues that the district court found that he violated probation by failing to "comply" with treatment and that this finding is clearly erroneous because the record shows he made some progress in treatment. Balzum's contention misconstrues the district court's finding. The district court found that Balzum violated the condition of probation that required him to "enroll in and successfully complete a sex offender evaluation and follow all recommendations." Balzum completed an assessment, which recommended that he complete an outpatient sex-offender treatment program. As the district court found, it is undisputed that Balzum did not complete the recommended treatment program: he was discharged from the program without having completed it.

Balzum asserts that he did not violate the condition "unless the simple fact that [the treatment program's] decision to terminate him is sufficient." This argument is unpersuasive because the district court considered the underlying reasons for Balzum's discharge from treatment. Clear-and-convincing evidence in the record shows that after two years in the treatment program, Balzum had failed to complete the first step of a seven-step program, even though his therapist testified that it is possible to complete the first six steps within 18 months. The record also clearly and convincingly shows that

while Balzum was in the program, he was "defiant," "manipulative," dishonest, and that he failed to take responsibility for his criminal actions. According to the termination letter written by his therapist, Balzum showed "no desire to address his sexual deviance in any meaningful manner" and is seen as a person who "will not take any treatment program seriously." Balzum's therapist stated that he is not optimistic that Balzum will ever be amenable to treatment. Thus, the district court's finding that Balzum violated a condition of his probation by failing to complete outpatient sex-offender treatment was not clearly erroneous.

The Violation Was Intentional or Inexcusable

Balzum challenges the district court's finding that the violation was intentional or inexcusable. The district court reasoned:

> The testimony and submissions prove that [Balzum] has not been engaged in the sex offender treatment process and that [Balzum] has failed to take responsibility for his actions; this failure to engage in the process is solely [Balzum's] failure. [Balzum's] actions clearly have frustrated the treatment process and his refusal to disclose/admit to his offenses during the treatment process has prevented his progress in the program. Only [Balzum] has the ability to admit to his actions and to make progress in outpatient sex offender treatment. [Balzum] does exercise control over his own progress in the program and has failed to make progress in outpatient sex offender treatment; [Balzum] offered no excuse for his failure to make progress in outpatient sex offender treatment program. The Court, therefore, can reach no other conclusion [than] that [Balzum's] violations are inexcusable.

The record supports the district court's reasoning and conclusion that the violation was intentional and inexcusable. The record shows that in October 2010, the treatment program asked Balzum to explain, in writing, why the program should allow him to

continue when he had refused to be forthcoming with data, refused to take responsibility for his actions, would not do the assignments, and would not listen to feedback from other treatment participants. The program alerted Balzum that "he probably should be terminated and that it did not appear that he would ever do the treatment program." Despite this warning, which included a detailed description of his treatment failures, Balzum did not improve his performance to the satisfaction of the program.

Balzum argues that "he was compliant in all other aspects of probation outside of the treatment room." But completion of sex-offender treatment is reasonably viewed as one of the most important components of Balzum's rehabilitative probationary agreement. The fact that he complied with other conditions of probation does not excuse his failure to complete treatment. In sum, the district court did not abuse its discretion in determining that the violation was inexcusable and intentional.

The Need for Confinement

Balzum argues that the district court improperly determined that the need for confinement outweighs the policies favoring probation. A district court may decline to revoke probation based on policy considerations even if the circumstances satisfy the first two *Austin* considerations. *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005). Indeed, a district court should revoke probation "only as a last resort when treatment has failed" or when the probationer has demonstrated that he or she "cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 250-51 (quotations omitted). When deciding whether to revoke probation, a district court should weigh the probationer's interest in freedom against the state's interests in public safety and the probationer's

rehabilitation. *Id.* at 250. To ensure that the balance is properly struck between those interests, a district court should not revoke probation unless it finds that

> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if [the offender] is confined; or
>
> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Modtland, 695 N.W.2d at 607 (quotation omitted).

In *State v. Austin*, the probationer failed to enter a drug treatment program as required by his conditions of probation. 295 N.W.2d at 249. At the probation-violation hearing, the director of the treatment program testified he would be willing to accept the probationer into the program notwithstanding his previous failure to enroll in the program as instructed. *Id.* Despite this testimony, the district court revoked probation and executed the probationer's sentence. *Id.* The Minnesota Supreme Court affirmed, reasoning that the probationer "has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed." *Id.* at 251. The supreme court also explained that "the record shows the seriousness of his violation would be denigrated if probation were not revoked," and thus, "policy considerations required revocation." *Id.*

Here, the district court weighed policy considerations for and against revocation in deciding to revoke Balzum's probation. The court explained that:

> [W]e look at the violation and we look at what the policies of probation are for and I make a determination, should you go to prison or should you not.

> And in this case and in particular looking at the long length of time that you had to prove yourself. You had two years. If you had made some substantial progress, that would have been to your benefit. . . . I'm looking at such a long list and timeline of your behaviors in treatment and particularly . . . blaming the victims, not taking really any ownership.

Although Balzum expressed his willingness to resume treatment at the dispositional hearing, the district court indicated that it did not find it genuine:

> It is not unexpected that on the date of your disposition hearing when you're looking at a prison sentence and you have been spending some time in jail that you would tell me that you have a different outlook, but really what I look at in a case like this is your past behavior. Your actions to me are speaking louder than your words. You've had two years to show me that you can make some progress and you haven't done that and because of that, in this long length of time, I find that in this case the need for confinement does outweigh the policies favoring probation.

Similar to the circumstances in *Austin*, Balzum "has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation." *Id.* He claims that "[t]he evidence does not support a finding that treatment failed, or that [he] cannot be counted on to avoid anti-social activity." This claim is simply inaccurate. Two years after entering treatment with a 30-month prison sentence hanging over his head, Balzum had not successfully completed the first step of a seven-step program. The district court discredited his assertion that he was willing to complete a treatment program, putting greater weight on his actions. We defer to this credibility determination. *See State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005)

("Because the district court's role is to judge the credibility of the witnesses, we defer to the district court's credibility evaluations."), *aff'd*, 721 N.W.2d 886 (Minn. 2006).

Balzum argues that "if the violations are mitigated," the district court should consider alternatives other than revoking probation and contends that "because [his] probation violation hearing was heard by two different judges, the court determining disposition did not hear all the evidence, including mitigating evidence of the violation." The record refutes that contention. At the disposition hearing, Balzum's sentencing judge stated that she had examined Balzum's file, reviewed the first district court judge's order, and agreed with the judge's findings on the first two *Austin* factors. Moreover, the sentencing judge considered Balzum's arguments against revocation at the dispositional hearing.

Balzum also argues that this was his "first problem with the treatment program and he should have been given the opportunity to get back into treatment." We disagree that his discharge was the "first problem with the treatment program." In October 2010, the treatment program informed Balzum that his performance was unacceptable and warned him that he could be terminated. The record shows that at the time of that warning, Balzum's unacceptable performance had been ongoing since he began the program approximately 17 months earlier. The record also shows that his unacceptable performance continued until his discharge approximately eight months later. Thus, his discharge was not his "first problem" in treatment—it was the culmination of two years of ongoing problems.

Moreover, Balzum was given some opportunity to get back into treatment. The district court's first order, finding an intentional and inexcusable violation and ordering a disposition hearing, "specifically notes that the scheduling of this Disposition Hearing will allow the Defendant's legal counsel to confer with one of the Dispositional Advisers . . . if so desired," thereby providing Balzum an opportunity to arrange an alternative treatment plan before the disposition hearing. Yet, Balzum did not propose an alternative program at the dispositional hearing. Balzum argues that he "had four years remaining [on probation], which was more than enough time to find another program." But probation can be violated based on a failure to complete treatment even if the probationary period has not expired. *See* Minn. Stat. § 609.14, subd. 1(a) (2010) (stating that the court may revoke a stay "[w]hen it appears that the defendant has violated any of the conditions of probation . . . or has otherwise been guilty of misconduct which warrants the imposing or execution of sentence").

Regardless of the time remaining, the district court concluded that Balzum had failed to commit to the treatment program and that "given the seriousness of these crimes, prison is what is called for." Clear-and-convincing evidence in the record supports this determination. For example, the termination letter from Balzum's treatment program states:

> I believe this individual is most likely a public risk to children. He has an attraction he refuses to address in a meaningful way [and] because of his refusal to do treatment, he may harm a child in the future. It would appear at this time to us [that] it would be in his best interest to be in a restrictive environment so he has no contact with children for their safety and [to] assist him in not having a new offense. I

> believe this is a person that would need a very serious consequence to ever be motivated to take any treatment program seriously. I question if he would ever take a treatment program seriously. I would question if he would ever be amenable to any treatment, inpatient or outpatient.

In sum, Balzum has not completed treatment, he has been discharged from treatment, he is not likely to complete treatment, and his failure to complete treatment makes him a threat to public safety. Thus, the district court did not abuse its discretion by concluding that the need for confinement outweighs the policies favoring probation and revoking Balzum's probation. *See Austin*, 295 N.W.2d at 251 (affirming revocation based on the probationer's prior failure to take advantage of treatment).

Affirmed.