STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0511

State of Minnesota,
Respondent,

vs.

Anthony Lenway Narvaez,
Appellant.

Filed December 16, 2013
Affirmed
Chutich, Judge

Polk County District Court
File No. 60-CR-10-480

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Deborah K. Ellis, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Chutich, Judge; and Klaphake, 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

CHUTICH, Judge

Appellant Anthony Lenway Narvaez challenges the district court's decision to revoke his probation and execute his sentences for fourth-degree sale of a controlled substance and conspiracy to commit first-degree sale of a controlled substance. He argues that: 1) the district court made a structural error in failing to advise him of his probation revocation rights under Minn. R. Crim. P. 27.04, subd. 2(1)(c); and 2) the district court abused its discretion by revoking his probation. Because the district court's omission was not structural error and did not prejudice Narvaez, and because the district court properly acted within its discretion in executing Narvaez's sentences, we affirm.

FACTS

In July 2010, Narvaez pleaded guilty to fourth-degree sale of a controlled substance and conspiracy to commit first-degree sale of a controlled substance. The district court sentenced him to 18 months in prison on the fourth-degree sale conviction and 146 months in prison on the conspiracy conviction, but stayed both sentences for 20 years. Narvaez was on probation for two prior felony convictions at the time of sentencing.

Narvaez's sentence included serving one year in jail. While he was serving that time, Narvaez was released for work privileges. On some of the days that he was released, however, Narvaez did not go to work but instead went home. According to the state, Narvaez lied about going to work on 17 occasions and falsified documents in support of the lie. Narvaez admitted violating his probation, and, consequently, in May

2011, the district court allowed him to remain on probation with the additional condition that he serve 180 days in jail.

On September 1, 2012, Crookston police arrested Narvaez for driving under the influence and contempt of court. Tri-County Community Corrections prepared a violation report, alleging Narvaez violated probation for failure to remain law abiding and failure to abstain from mood-altering substances.

Narvaez appeared in court for the first time on these probation violations on September 5, 2012, with his attorney. The district court asked Narvaez's attorney if he reviewed with Narvaez "his rights at any probation violation hearing" and "the alleged probation violations." Narvaez's attorney responded, "Yes, [Y]our Honor." Narvaez did not admit or deny the violations that day.

On September 10, 2012, Narvaez appeared, with counsel, for his "admit/deny" hearing. Narvaez denied the violations, and the district court scheduled a contested-probation-violation hearing.

On September 17, 2012, Narvaez appeared with counsel for his hearing. Narvaez's attorney stated that Narvaez was "prepared to admit the violations" and asked "that we just kind of keep it to a general admission since there[] [are] charges still pending," requesting to return for disposition in five weeks. Narvaez admitted that he violated probation "by being arrested September [1]st, 2012, for driving under the influence and contempt of court" and by "consuming and possessing alcohol" that day. Narvaez later pleaded guilty in the criminal case to fourth-degree driving while impaired and exhibition driving.

At the disposition hearing, Narvaez and his attorney asked the court to accept the probation department's recommendation of reinstating Narvaez on probation and imposing 180 days in jail. The state argued for probation revocation. The district court revoked Narvaez's probation, finding the violations to be "intentional and knowing" and that "the public policy of favoring probation over incarceration is outweighed by the threat to the public safety in this matter." It then executed his 146-month and 18-month prison sentences, to be served concurrently. This appeal followed.

D E C I S I O N

I. Probation Revocation Rights

Narvaez argues that the district court's failure to advise him of the rights listed in subdivision 2(1)(c) of Minnesota Rule of Criminal Procedure 27.04 was structural error, requiring automatic reversal of his probation revocation. "The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (quotation omitted). Because we find Narvaez's argument unpersuasive, we affirm.

Revocation of probation "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special probation restrictions." *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008) (quotation omitted). Under Minnesota Rule of Criminal Procedure 27.04, which governs probation revocation proceedings, the district court must advise the

probationer of his constitutional rights at a preliminary probation violation hearing. Minn. R. Crim. P. 27.04, subd. 2(1)(c).[1]

In *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, the Supreme Court set forth the requirements for due process in parole and probation revocation proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 93 S. Ct. 1756, 1760 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604 (1972). "At 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." *Gagnon*, 411 U.S. at 786, 93 S. Ct at 1761.

"Generally, most constitutional errors are reviewed for harmless error." *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011). A very limited class of errors, however, referred to as "structural errors," "require automatic reversal of a conviction." *Id.* at 851 (quotation omitted). Structural errors are "defects in the constitution of the trial mechanism" that "defy" harmless-error review and affect "the entire conduct of the trial." *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 1265 (1991))

[1] The rule requires the court to advise the probationer of the right to: 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) "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) "present mitigating evidence or other reasons why the violation, if proved, should not result in revocation"; and 6) "appeal any decision to revoke probation." Minn. R. Crim. P. 27.04, subd. 2(1)(c).

(quotation marks omitted). These errors "call into question the very accuracy and reliability of the trial process." *State v. Everson*, 749 N.W.2d 340, 347 (Minn. 2008) (quotation omitted).

Not all judicial errors are structural, and "most constitutional errors can be harmless." *State v. Shoen*, 598 N.W.2d 370, 375 (Minn. 1999) (quotation omitted). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578–79, 106 S. Ct. 3101 (1986)).

The Supreme Court and Minnesota Supreme Court have found a small number of errors to be structural, including: a constitutionally insufficient reasonable-doubt jury instruction; total denial of the right to counsel at trial; denial of the right to an impartial judge; denial of the right to a public trial; and prejudice resulting from the failure to dismiss a prospective juror for cause. *Kuhlmann*, 806 N.W.2d at 851 (collecting cases). Additionally, a district court's "failure to advise a probationer of the right to counsel mandates reversal of a probation revocation." *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006).

Applying these principles here, the district court's omission does not amount to structural error. While the district court did not advise Narvaez of the rights set forth in rule 27.04, Narvaez was represented by counsel at all stages of the probation revocation proceedings. At the initial appearance, the district court specifically inquired of Narvaez's attorney whether he had conveyed Narvaez's rights to him, and Narvaez's attorney confirmed that he had done so. We have more in this case than the presumption

that, because Narvaez was represented, he had been fully advised of his rights. *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.").

Narvaez cites no authority that supports his argument that the district court's error was structural. And the court's omission here is not the type of error that "call[s] into question the very accuracy and reliability of the trial process." *See Everson*, 749 N.W.2d at 347 (quotation omitted). Rather, Narvaez received notice of the alleged violations and had the opportunity to be heard and present evidence on his behalf, as *Gagnon* requires. *See* 411 U.S. at 782, 93 S. Ct. at 1760.

Because the district court's omission does not mandate automatic reversal, we turn to harmless-error review. District courts should advise probationers of their probation revocation rights, as rule 27.04 directs. But Narvaez has not shown how he was prejudiced by the district court's failure to specifically advise him. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded."). Narvaez was represented by counsel at his three probation violation hearings; at the initial appearance, the district court inquired of counsel, and Narvaez's attorney affirmatively responded that he had reviewed Narvaez's probation violation rights with him; and this was not Narvaez's first probation violation. For these reasons, we hold that the district court's omission was harmless.

II. Sufficiency of the Evidence to Revoke Probation

"The trial 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). We review de novo whether a district court made proper findings before revoking probation. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Before revoking probation, 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 [the] need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250 (quotation omitted); *see Modtland*, 695 N.W.2d at 606–08 (reaffirming *Austin*'s holding). In making these findings, courts are not to offer simply "general, non-specific reasons for revocation"; rather, district courts "must seek to convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608.

When assessing whether revocation is proper, "courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* at 607 (quotation omitted). District courts should consider whether

> (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 he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Austin, 295 N.W.2d at 251. The court's determination to revoke "cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* (quotation omitted).

After Narvaez's first admission to violating his probation in this case—when he lied on several occasions about going to work while serving his jail sentence—the district court stated that it was

> not prepared to find that Mr. Narvaez is un-amenable to probation at this point in time, although his previous violations almost swayed the Court to the other direction in this matter; but this violation, having been exceedingly stupid rather than a new criminal act . . . the Court doesn't feel comfortable sending Mr. Narvaez to prison for ten years because of such a stupid act.

The district court then warned Narvaez, however, that it was "not going to be so understanding in the future."

The same district court judge then determined whether to revoke Narvaez's probation for the violations at issue in this appeal. Before the revocation hearing, the state sent a letter to the district court, summarizing Narvaez's extensive criminal history and probation violations in previous cases. In deciding to revoke probation, the judge stated that "the public policy of favoring probation over incarceration is outweighed by the threat to the public safety in this matter." While he was reluctant to revoke Narvaez's probation, the judge found that, after examining Narvaez's file and the presentence investigation, "this has been going on for years. And the Court at this point in time is not willing to risk the public safety by continued drug use or alcohol use." The judge told

Narvaez, "the Court is especially disturbed . . . that you were operating a motor vehicle while intoxicated when you had all this time weighing over your head and you had a previous sentence."

Narvaez claims that "[n]either public safety nor seriousness of the violation warranted execution" of his sentence. He asserts that the district court failed to adequately consider his "successful completion of an intense inpatient treatment program," which showed "he could be counted on to avoid the behavior forming the basis for the probation violation."

Here, the district court properly considered whether "confinement is necessary to protect the public from further criminal activity" and concluded that it *is* necessary for Narvaez. *Austin*, 295 N.W.2d at 251 (quotation omitted). The district court specifically stated its unwillingness to risk the safety of the public by Narvaez's continued drug use or alcohol use. The district court also considered Narvaez's history with probation and the seriousness of operating a motor vehicle while intoxicated. The district court did not simply make a "reflexive" decision, as *Austin* and *Modtland* prohibit.

Narvaez informed the district court that he completed treatment, and no evidence shows that the district court did not consider this accomplishment in making its determination. Despite Narvaez's success in completing treatment, the district court found that confinement was necessary given his past behavior. The district court adequately conveyed its "substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608.

Narvaez also claims that driving under the influence was conduct "hardly worthy of a twelve year sentence." But Narvaez was not sentenced to twelve years for his driving-while-impaired offense—his twelve-year sentence was imposed for his conviction for conspiracy to commit a controlled substance crime in the first degree.

"Less judicial tolerance is urged for offenders who were convicted of a more severe offense." Minn. Sent. Guidelines 3.B (2012). The sentencing guidelines commission views revocation justified when "[t]he offender continues to violate conditions of the stay despite the court's use of expanded and more onerous conditions." *Id.* Narvaez's first-degree controlled substance conviction has a severity level of nine in the sentencing guidelines, and he previously violated probation when he "escaped" from jail on numerous occasions. *Id.* at 2.A.4, 4.A; *see State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (determining that conspiracy to commit a controlled substance crime in the first degree, with a severity level of nine, "can be properly characterized as 'severe'"). Furthermore, the record shows Narvaez was already on felony probation when he committed the underlying drug offenses.

Contrary to Narvaez's characterization of his conduct as mere "driving violations," driving under the influence is a serious offense. The public policy behind the prohibition of drunk driving "is substantially heightened in comparison to the general scheme of driving laws, in that their violation creates a greater risk of direct injury to persons and property on the roadways." *State v. Stone*, 572 N.W.2d 725, 731 (Minn.

1997). In sum, the district court made proper findings before revoking Narvaez's probation and acted within its discretion in executing his sentences.

Affirmed.