STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1415

State of Minnesota,
Respondent,

vs.

Marshall Edward Simon,
Appellant.

Filed April 13, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-04-6111

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant argues that the district court's decision to revoke his probation and execute his sentence for second-degree criminal sexual conduct was an abuse of

discretion because the evidence does not show that the need for appellant's confinement outweighs the policies favoring probation. We affirm.

FACTS

Appellant Marshall E. Simon pleaded guilty to second-degree criminal sexual conduct in February 2005. His charge arose out of an incident in which appellant pulled a nine-year-old boy under a blanket and sexually assaulted him. Appellant was sentenced to a term of 39 months, but the sentenced was stayed, and appellant was placed on supervised probation for five years.

In October 2006, appellant violated his probation when he was charged with fourth-degree driving while impaired (DWI) and later pleaded guilty to an amended charge of careless driving. At a probation-revocation hearing in November, the district court decided to continue appellant's probation. In August 2007, appellant again violated his probation when he was terminated from an Anoka sex-offender treatment program for violating its absence policy. The district court again continued appellant's probation, and appellant was ordered to re-enter the Anoka treatment program.

In February 2009, appellant violated the terms of his probation by failing to report a secondary address and by having unsupervised contact with minors J.W. and S.M. The district court held a probation-revocation hearing in May 2009. Appellant denied the allegations and requested a *Morrissey* hearing. Detective Todd Ewing of the Brooklyn Park Police Department testified at the hearing for respondent State of Minnesota. Detective Ewing stated that he received a report in February 2009 that a nine-year-old boy, J.W., had complained to his aunt about pain in his bottom and penis. His aunt was

concerned because J.W. was living with his grandmother, A.W., who was dating appellant at that time. J.W.'s aunt was aware of appellant's prior conviction. In an interview, J.W. told Detective Ewing that appellant lived at his home and normally slept with A.W. But if J.W. was frightened at night, appellant would come and lie with him. J.W. also indicated that appellant would come and lie with him when appellant and A.W. got into an argument. Detective Ewing testified that J.W. used the word "snuggling" to describe those encounters. J.W. denied that any sexual contact occurred between himself and appellant and stated that appellant did not cause the pain he had initially complained about. J.W. also stated that appellant would pick him up from school on occasion. In a CornerHouse interview, J.W. repeated the same information. When Detective Ewing interviewed A.W., she initially stated that appellant lived with her, but later changed her statement to indicate that appellant used to stay at her home on weekends but no longer did so.

Cristy Rahill, appellant's probation officer, also testified for the state. Rahill discussed appellant's efforts with sex-offender treatment programs. According to Rahill, after appellant was terminated from the Anoka program in August 2007, he did complete the program. But because the Anoka program "is not a primary sex offender treatment model," Rahill hoped that appellant would be admitted into a more intensive program following completion of the Anoka program. Rahill also testified that she spoke with appellant regarding the unsupervised contact with J.W. and that he admitted to "laying with the child when . . . watching television." Rahill stated that she believes appellant "remains at risk to re-offend because he is an untreated sex offender." But Rahill also

recommended "to have [appellant] evaluated for residential sex offender treatment [in the Alpha Program] and to continue probation" because she does not believe that he will receive sex-offender treatment either in prison or after he serves his sentence.

Appellant testified on his own behalf, stating that he visited A.W.'s home "maybe once a week" but did not go there on the weekends or stay overnight at the house. Appellant also testified that he had no unsupervised contact with J.W. On cross-examination, appellant stated that he only picked up J.W. from school once, and S.M., J.W.'s 17-year-old aunt, was present on that occasion. Appellant also denied telling Rahill that he had lain with J.W. once or twice while watching television.

The district court articulated its findings and conclusions on the record. The district court stated that it found appellant's violation "very, very concerning . . . and very distressing because of the fact[] . . . that he had completed some type of treatment and then these allegations arose even after that." The district court determined that ordering appellant to participate in the Alpha sex-offender program, as Rahill recommended, would not be an appropriate course of action because

> it still does not address admissions or taking responsibility, and . . . the types of recommendations as to what would happen in counseling are certainly not enough in my mind to address, even if he was successful, the fact that there are minor children who are vulnerable who he finds and manipulates.

The district court specifically found that appellant's incarceration is necessary "to protect the public from further criminal activity, and as against—violations against minors who are particularly vulnerable victims."

Based on these findings, the district court executed appellant's sentence for criminal sexual conduct, which included a term of 39 months and a ten-year conditional-release period. This appeal follows.

D E C I S I O N

"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). "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." *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005) (quotations omitted). The decision to revoke cannot be "a reflexive reaction to an accumulation of technical violations" but instead requires a showing that the "offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotations omitted).

The *Austin* court articulated three specific findings that the district court must make before revoking probation: "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.* at 250. The district court must make these findings on the record and "should not assume that [it] ha[s] satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation." *Modtland*, 695 N.W.2d at 608.

Appellant challenges the third finding of the district court, arguing that the district court abused its discretion by finding that the need for appellant's confinement outweighs the policies favoring probation. The third *Austin* factor is satisfied if one of the following is met:

> (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 (quotation omitted). The district court specifically found that the need for appellant's confinement outweighs the policies favoring probation because confinement is necessary to protect the public from further criminal activity by appellant.

Appellant argues that the district court abused its discretion by failing to "take into account all [of] appellant's positive attributes and the progress that he had made while on probation" and by ignoring the recommendation of Rahill that appellant continue with additional sex-offender treatment. District courts must bear in mind that "the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Modtland*, 695 N.W.2d at 606 (quotation omitted). Here, the record reflects that the district court specifically considered appellant's efforts while he was on probation and the available alternatives to revocation of his probation.

First, with respect to appellant's progress during probation, the district court expressed serious concern with the fact that despite appellant's completion of the Anoka sex-offender treatment program, he still engaged in the conduct leading to his recent probation violation. Rahill testified that appellant should have learned that it would

violate both his probation and "appropriate boundaries" to be with J.W. without supervision. And the conduct that appellant engaged in is strikingly similar to that which brought about his original criminal-sexual-conduct charges. Furthermore, the district court found that appellant is at a high risk to reoffend because he remains an untreated sex offender, despite his efforts during his probationary period. And appellant's probation officer also testified that she considers appellant to be an untreated sex offender. Therefore, the record reflects the district court took appellant's probation history into account but found that, despite completion of some of the conditions, appellant remains a risk to the public.

Second, the district court considered the Alpha sex-offender treatment proposed by Rahill but found that the program would not be adequate to address "the fact that there are minor children who are vulnerable who [appellant] finds and manipulates." The district court also noted that the proposed treatment program would not be an appropriate alternative because the program does not focus on participants' admissions and taking responsibility. Rahill testified that appellant still needs work on these particular issues and continues to deny that his original offense included a sexual act. Finally, the district court stated that appellant's probation violations "go to the very essence" of a concern for public safety. This record reflects that the district court carefully considered the proposed alternatives and properly balanced them against the risk to public safety.

Because the district court carefully considered the third *Austin* factor, made specific findings on the record, and appropriately balanced appellant's interest in freedom

from confinement with the public interest of safety, we conclude that it was not an abuse of discretion to revoke appellant's probation.

Affirmed.