STATE OF MINNESOTA
IN COURT OF APPEALS
A10-44

State of Minnesota,
Respondent,

vs.

Jared Schultz, Jr.,
Appellant.

Filed August 17, 2010
Affirmed
Larkin, Judge

Martin County District Court
File No. 46-CR-05-1631

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

Terry W. Viesselman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, Fairmont, Minnesota (for respondent)

John G. Westrick, Westrick & McDowall-Nix, P.L.L.P., St. Paul, Minnesota; and

Terry P. Duggins, The Duggins Law Firm, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, 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. Because the district court did not abuse its discretion by revoking appellant's probation, we affirm.

FACTS

In September 2005, appellant Jared Schultz Jr., then 18 years old, sexually penetrated an 11-year-old girl. In April 2007, Schultz pleaded guilty to one count of first-degree criminal sexual conduct based on this conduct. At his sentencing hearing in July 2007, the district court granted a downward-dispositional sentencing departure. The district court ordered that Schultz be committed to the Commissioner of Corrections for the presumptive term of 144 months, but stayed execution of the sentence on the following conditions:

> No. 1) That [Schultz] will be remanded to the custody of the Martin County sheriff for a period of one year, in addition to any time which he may have previously served.
>
> Secondly, that he will have a sexual offender evaluation through a program such as the CORE program in Mankato; that he will follow specifically and faithfully each and every recommendation for counseling.
>
> That he will have an assessment for any chemical dependency issues and likewise follow those without fail.
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> That he will continue with whatever counseling may be appropriate with [his counselor] until the counselor determines that it is no longer necessary. And the Court will look at [Schultz]'s progress on his sexual offender treatment before the expiration of one year and will determine at that point in time whether he merits the continued stay of execution or whether he has failed to meet the expectations of the Court and should therefore be committed directly to the Commissioner for the presumptive sentence.

After the district court had announced these conditions, the following exchange occurred between the prosecutor and the district court:

> PROSECUTOR: And, Your Honor, I think the Court said it, but there would be no contact with the victim?
> THE COURT: Absolutely none.
> PROSECUTOR: And would the Court also order that [] Schultz have no contact with minor females under the age of 18?
> THE COURT: Well, presumptively, so long as he's incarcerated that will be impossible, but when we get to the point of either him returning to a probationary status, we can address those issues.

The district court issued a written sentencing order after the hearing. The order enumerates the conditions of probation and expressly states that "[Schultz] will have no contact with minor females under the age of 18 years." The district court later granted Schultz a furlough from the Martin County Jail to attend out-patient sex-offender treatment. According to the furlough order, Schultz was "to report directly to the treatment group in Mankato and immediately return to the Martin County Jail upon the conclusion of each treatment session." The order states that while on furlough, "[Schultz] shall make no stops while in transit to the treatment program or while returning to the Martin County Jail."

The matter came on for an anticipated review hearing on March 10, 2008. At that hearing, the district court asked Schultz if he had had physical contact with his girlfriend before returning to the Martin County Jail while on furlough to attend sex-offender treatment. Schultz admitted that he had. The district court executed Schultz's sentence, and Schultz appealed. This court found that the record lacked a reasoned analysis of

whether the need for confinement outweighed the policies favoring probation—the third of three factors that the district court is required to consider before revoking probation under *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). We therefore reversed the revocation of Schultz's probation and remanded for consideration of the *Austin* factors. *State v. Schultz*, No. A08-936, 2009 WL 1586824, at *4 (Minn. App. June 9, 2009).

On remand, the district court held a contested probation-revocation hearing. At the hearing, the state alleged that Schultz violated probation by: (1) failing to make progress on his behavior, (2) failing to attend psychological counseling, (3) violating the terms of his furlough, (4) attempting to contact a female under the age of 18, and (5) violating the rules of the jail. Schultz argued that the no-contact-with-minor-females restriction was not a condition of his probation, as it was not specifically ordered by the district court at the sentencing hearing.

The district court found that Schultz had violated three conditions of probation: (1) failing to continue mental-health counseling, (2) having sexual contact with his 19-year-old girlfriend while on furlough from the Martin County Jail to attend sex-offender treatment, and (3) attempting to contact a female under the age of 18 while he was in jail. The district court found that Schultz's violations were intentional and inexcusable and that they were "indicative of [Schultz's] continuing threat to public safety if the balance of his sentence is not executed." The district court revoked Schultz's stayed prison sentence and committed him to the Commissioner of Corrections. 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." *Austin*, 295 N.W.2d at 249-50. However, before revoking probation, the district court must (1) designate the specific probation condition or conditions 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. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 250). The third factor is satisfied if the district court 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 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.

On appeal, Schultz does not deny that he failed to continue mental-health counseling, that he had contact with his girlfriend while on furlough, or that he attempted to contact a female under the age of 18 from jail. Instead, Schultz contends that his attempt to have contact with a minor female cannot be a basis for a probation violation because the no-contact provision was not orally pronounced by the district court at sentencing.[1] Schultz argues that "[b]ecause the [district c]ourt's oral pronouncement

[1] Schultz asserts that the district court found only one probation violation: attempting to contact a minor female from jail. But as discussed above, the district court actually found three violations on remand: (1) failing to continue mental-health counseling, (2) having sexual contact with a girlfriend while on furlough, and (3) attempting to contact a minor

controls over the written order . . . the no-contact-with-minor-females provision was not a true condition of [his] probation, and his probation cannot be revoked because he attempted to have such contact." (Quotation marks omitted.)

In probation revocation proceedings, "the condition alleged to have been violated must be a condition of probation that has in fact been imposed by the district court." *State v. Ornelas*, 675 N.W.2d 74, 75 (Minn. 2004). When pronouncing a sentence, the district court must "[s]tate precisely the terms of the sentence." Minn. R. Crim. P. 27.03, subd. 4(A).[2] "[T]he responsibility for stating the precise terms of a sentence rests squarely with the [district] court." *State v. Staloch*, 643 N.W.2d 329, 332 (Minn. App. 2002). "[A]n orally pronounced sentence controls over a judgment and commitment order when the two conflict." *Id.* at 331 (quoting *United States v. Villano*, 816 F.2d 1448, 1450-52 (10th Cir. 1987)). But "[w]hen an orally pronounced sentence is ambiguous . . . the judgment and commitment order is evidence which may be used to determine the intended sentence." *Id.* (quoting *Villano*, 816 F.2d at 1451). "This is the purpose of the written order: to clarify an ambiguous oral sentence by providing evidence of what was said from the bench." *Id.* (quotation omitted).

In this case, the district court did not expressly reject the state's request that Schultz be ordered to have no contact with minor females as a condition of probation.

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female. Schultz presented no argument regarding the first and second violations in his brief.

[2] Rule 27.03 was rewritten after the district court proceedings but before this appeal. Because the revision did not change the substance of the relevant part of the rule, we cite the current rule. The prior version of the rule provided that "[w]hen sentence is imposed the court . . . [s]hall state the precise terms of the sentence."

Instead, the district court suggested that such a condition was not necessary because Schultz would be incarcerated. The district court explained: "Well, presumptively, so long as he's incarcerated [contact with minor females] will be impossible, but when we get to the point of either him returning to a probationary status, we can address those issues." To the extent that the district court's oral statements presumed that Schultz would have no contact with minor females as a result of his incarceration, the oral and written pronouncements are not in conflict.

Moreover, the orally pronounced sentence is ambiguous. Schultz argues that the district court denied the state's request for a no-contact-with-minor-females probationary condition at sentencing. That is one reasonable interpretation of the district court's statement. But while the district court did not explicitly order Schultz to have no contact with minor females, another reasonable interpretation of the district court's statement is that the court did not approve of such contact, did not intend Schultz to have such contact, and thought an express order prohibiting such contact was unnecessary because such contact would be "impossible" while Schultz was incarcerated. Because the district court's oral pronouncement is subject to more than one reasonable interpretation, it is ambiguous. *See State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003) (stating a statute is ambiguous when its language is "subject to more than one reasonable interpretation"). And because it is ambiguous, we may look to the written sentencing order to determine the intended probationary conditions.

The written sentencing order clarifies the district court's oral sentence. The order unequivocally states that the district court intended that Schultz have no contact with

minor females as a condition of his probation. We therefore conclude that the no-contact-with-minor-females provision was a condition of Schultz's probation, and the district court's findings satisfy the first *Austin* factor.

Schultz also argues that "given the disparity between the oral sentence and the written one, any confusion [Schultz] might have had would render his actions excusable." We read this as a challenge to the district court's finding on the second *Austin* factor—that the violation was intentional or inexcusable. 295 N.W.2d at 250. Despite our conclusion that the oral sentence was ambiguous, we are not persuaded that the ambiguity excuses Schultz's violation. Schultz was on probation for sexually penetrating an 11-year-old girl. The district court's statements at sentencing indicated that it did not approve of Schultz having contact with minor females, and its written sentencing order expressly prohibited such contact. And Schultz's court-ordered sexual-offender evaluation recommended that Schultz have no contact with minor females.[3] Moreover, Schultz admitted that his contact with his girlfriend while on furlough manifested an unwillingness to listen to and abide by court orders. On this record, the district court did not err by concluding that Schultz's violation was intentional and inexcusable.

[3] One condition of probation that was explicitly stated at sentencing and included in the written order was that Schultz undergo a sexual-offender evaluation and "follow specifically and faithfully each and every recommendation for counseling." At the probation revocation hearing, a Department of Corrections sex-offender agent informed the court that Schultz's court-ordered sexual-offender evaluation "recommended that [Schultz] complete sex offender treatment, that he remain alcohol and drug free, that he have no access or possession of pornography[, t]hat he have no contact with the victim[, *and t*]*hat he have . . . no unsupervised contact with females under the age of 18*." (Emphasis added.)

Schultz also appears to challenge the district court's finding on the third *Austin* factor—that the need for confinement outweighs the policies favoring probation. *Id.* Pursuant to our remand instructions, the district court explained the reasons why it concluded that confinement was necessary. The district court found that Schultz's actions "reveal his lack of respect for the probationary process as well as his continuing inappropriate sexual propensities." The district court reasoned this "combination of perils," as well as the seriousness of the underlying conviction, jeopardized public safety. The district court also cited Schultz's lack of insight, which was demonstrated by his attempt to contact a minor female while in jail facing a prison sentence for having sexually penetrated a minor and his sexual contact with his girlfriend while on a furlough approved solely for travel to and participation in court-ordered sex-offender treatment. The district court acknowledged that the found violations were not "on par" with the severity of the underlying offense, but nonetheless concluded that Schultz had proven himself unamenable to probation and a continuing threat to public safety. The district court's reasoning is sound and does not constitute an abuse of discretion.

Affirmed.

Dated:

Judge Michelle A. Larkin