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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1051
A17-1750**

State of Minnesota,
Respondent,

vs.

Taylor James Pass,
Appellant,

and

Taylor James Pass, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 7, 2018
Affirmed
Bjorkman, Judge**

Dakota County District Court
File No. 19HA-CR-09-1823

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney,
Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In these consolidated direct and postconviction appeals, appellant challenges the revocation of his probation, arguing that he received ineffective assistance of counsel during the probation-revocation proceedings. We affirm.

FACTS

In August 2013, appellant Taylor Pass pleaded guilty to attempted second-degree murder. He received a 153-month stayed sentence (a downward dispositional departure) and was placed on supervised probation. Pass's probation officer advised him of the terms of his probation in person and in writing, including that he was not permitted to leave the state without permission.

In September 2014, Pass became concerned about the worldwide Ebola outbreak. He believed that the spread of Ebola would lead to the downfall of civilization and decided to escape to Alaska. He did not ask permission or notify his probation officer that he was leaving Minnesota. Pass's probation officer subsequently learned of Pass's departure and reported the violation. In November, Pass was arrested in Alaska and extradited to Minnesota. Pass's probation officer thereafter amended the violation report to allege a second violation involving "assaultive behavior" during Pass's time in Alaska. The probation officer recommended revocation of Pass's probation.

In early 2015, the district court appointed counsel to represent Pass in the probation-revocation proceedings. At counsel's request, the district court ordered a competency assessment. Pass was diagnosed with a delusional disorder, and the district court determined that he was not competent to proceed on the alleged probation violations. Pass was civilly committed for mental-health treatment. He initially refused medication. After several months of court-ordered medication, Pass's mental status and behavior improved, returning him to competence by the end of the year.

Pass's counsel advised him to deny the alleged violations, but Pass wanted to admit the travel violation and explain his conduct. He waived a contested hearing and admitted that he violated his probation by traveling to Alaska without permission.¹ But he challenged the recommendation that his probation should be revoked.

At the disposition hearing, the state presented the testimony of Pass's social worker and his probation officer. As the probation officer testified about the admitted travel violation, the following exchange occurred:

DEFENSE COUNSEL: I would stipulate that those were the probation violations, and further, since he's already admitted to violating those—

PROSECUTOR: The state's concern is, we have to make a finding it was intentional and inexcusable. If they're willing to stipulate that was intentional and inexcusable—

DEFENSE COUNSEL: I thought we did that already at the admit or deny and this was just on my misunderstanding.

¹ The state dismissed the assault allegation.

DISTRICT COURT: If we did I'm finding you're doing it again today. So the record is complete are you willing to stipulate that it was intentional and—

PROSECUTOR: Yes.

The hearing continued without further discussion of the stipulation. The probation officer testified that Pass's violation was intentional, that Pass "knew that you could not leave the state without permission and he did so." And the probation officer recommended revoking probation and executing Pass's sentence, largely because Pass has resisted medication and monitoring his medication compliance in the community is problematic. Pass and his counsel urged the district court not to revoke his probation, pointing to Pass's previously undiagnosed delusional disorder and the progress he made since his diagnosis and treatment.

The district court revoked Pass's probation. After finding that Pass's "venture to Alaska" was "significantly strange" and probably caused by his delusional disorder, the court determined that Pass consciously chose to abscond from supervision and is unlikely to comply with treatment and medication in the community. The district court summarized: "I believe absconding from probation as stipulated was intentional, inexcusable, and I think the only way we can adequately protect public safety is to execute the sentence." Pass appealed, then requested that this court stay the appeal and remand the case for postconviction proceedings, which we granted.

Pass petitioned for postconviction relief, alleging that his probation-revocation counsel was ineffective because he conceded the travel violation was intentional and inexcusable, instead of arguing that it was unintentional or excusable because of Pass's

delusional thinking. During an evidentiary hearing, Pass testified and presented the testimony of three witnesses, including his probation-revocation counsel. The district court denied the petition, reasoning that Pass's counsel was not ineffective and Pass had not demonstrated prejudice from the alleged ineffectiveness.

Pass appealed the denial of postconviction relief. We reinstated Pass's direct appeal and consolidated the appeals for decision.

D E C I S I O N

Pass challenges only the denial of postconviction relief premised on ineffective assistance of counsel. We review the denial of a petition for postconviction relief for an abuse of discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will not reverse findings of fact unless they are clearly erroneous but review issues of law de novo. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012).

A probationer has the right to counsel in probation-revocation proceedings. Minn. Stat. § 609.14, subd. 2 (2016); Minn. R. Crim. P. 27.04, subd. 2(1)(c), (2); *see also State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006) (recognizing probationer's right to counsel based on Sixth Amendment, statute, and rule). The right to counsel, whether constitutional or statutory, is the right to effective assistance of counsel. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (constitutional); *Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011) (statutory), *aff'd on other grounds*, 825 N.W.2d 716 (Minn. 2013). A defendant claiming he was denied the effective assistance of counsel must demonstrate "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different.” *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

We presume counsel's performance was reasonable and generally do not review counsel's strategic decisions. *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014). Counsel provides reasonable assistance when he exercises the customary skills and diligence that reasonably competent counsel would exercise under the circumstances. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001).

The circumstances relevant here are those of the “two-part revocation hearing” required under Minn. R. Crim. P. 27.04. *State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). First, the state must present clear and convincing evidence, or the probationer must admit, that “a probation violation exists.” Minn. R. Crim. P. 27.04, subd. 2(1)(c)b. Second, the state must demonstrate that “probation should be revoked.” Minn. R. Crim. P. 27.04, subds. 2(1)(c)b., 3(2)(b). In the second phase, the probationer may “present mitigating circumstances or other reasons why the violation, once proved or admitted, should not result in revocation.” *Xiong*, 638 N.W.2d at 503. Based on the evidence and admissions in the record, the district court must: (1) “designate the specific condition or conditions” that were violated, (2) “find the violation was inexcusable or intentional,” and (3) determine that “the need for confinement outweighs the policies favoring probation.” *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (reciting factors from *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)).

Pass argues that his counsel’s performance was deficient because he stipulated to or otherwise conceded the second *Austin* factor—that Pass’s probation violation was intentional or inexcusable—“when doing so was contrary to both his client’s wishes and any legitimate strategy.” This argument has some merit.

It is apparent from the postconviction record that defense counsel believed Pass’s admission to the probation violation constituted an admission that the violation was intentional or inexcusable and only the proposed disposition would be challenged. This belief is inconsistent with *Austin* and its progeny, which plainly distinguish between whether a probationer engaged in prohibited conduct and whether the violation was intentional or inexcusable, requiring the state to prove and the district court to find both factors before probation can be revoked.² *See id.* Insofar as Pass’s counsel failed to advise him of the significance of these distinct issues and advocate for his client in addressing each, his performance was flawed. But that does not end our analysis.

While Pass’s counsel may not have expressly challenged the second *Austin* factor, he substantively addressed the significance of Pass’s delusional disorder in the context of the probation violation. He elicited testimony that Pass had not been diagnosed with delusional disorder when initially placed on probation, felt “justified” in his flight to Alaska at the time, and now has been properly diagnosed, made significant progress with appropriate medication and treatment, and “would handle it differently” if faced with the

² We observe that counsel’s mistake appears attributable to a lack of clarity in the law regarding how the three *Austin* factors track the two phases of a probation-revocation hearing. But ambiguity regarding when and how the second *Austin* factor should be addressed does not obviate defense counsel’s obligation to address it.

same concerns. Based on that evidence, counsel argued that Pass “was sent out without the proper tools,” his unauthorized flight to Alaska was the result of his undiagnosed and untreated delusional disorder, and he should be afforded a chance to continue his successful treatment in a probationary setting. Thus, while Pass’s probation-revocation counsel appeared to stipulate or concede the second *Austin* factor was met, he squarely presented the evidence and arguments relevant to that factor that Pass contends he should have presented.

Moreover, Pass has not demonstrated prejudice from any claimed deficiency in his counsel’s performance. Despite the alleged stipulation, the record contains substantial evidence and argument on the issue of whether Pass’s trip to Alaska was an intentional violation of his probation or excused as the product of his undiagnosed delusional disorder. This includes undisputed evidence that Pass was aware of the travel restriction. The district court considered this evidence, together with the evidence of Pass’s delusional disorder, and expressly found that Pass made a conscious, intentional decision to abscond from probation. Because the district court made the requisite finding of intentionality after considering the impact of Pass’s mental illness, and the court’s finding has ample evidentiary support, any deficiencies in Pass’s counsel’s performance do not warrant reversal.

Affirmed.