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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1292**

State of Minnesota,
Respondent,

vs.

Yusuf Ahmed Osman,
Appellant.

**Filed March 6, 2017
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-14-13748

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant appeals from the revocation of his probation, arguing that the district court erred when it determined that the need for confinement outweighed the policy considerations favoring probation. We affirm.

FACTS

In May 2014, appellant Yusuf Osman was charged with third-degree criminal sexual conduct and two counts of domestic assault by strangulation. In one incident, appellant placed his hands around his girlfriend S.M.J.'s throat and caused her to black out. In another, he grabbed S.M.J. by the throat, forced S.M.J. to engage in vaginal intercourse, and digitally penetrated her anus.

In August 2014, appellant pleaded guilty to third-degree criminal sexual conduct, and by the terms of a plea agreement, the two counts of domestic assault were dismissed. The district court stayed imposition and placed appellant on probation for three years, with several conditions, including that appellant serve 364 days in jail and that he have no contact with S.M.J. A Domestic Abuse No Contact Order (DANCO) was also issued, requiring appellant to stay away from S.M.J. Appellant timely appealed his conviction on the basis that he should have been allowed to dismiss his appointed counsel and withdraw his plea at sentencing, and we affirmed his conviction. *State v. Osman*, No. A15-0030, 2015 WL 9437517 (Minn. App. Dec. 28, 2015), *review denied* (Minn. Mar. 15, 2016).

Appellant was released from jail in March 2015. In June 2015, law enforcement officers found S.M.J. and appellant together at a hotel. Discovering that there was an active

DANCO concerning appellant and S.M.J., police arrested appellant. The next day, an order for arrest and detention was issued based on the claim that appellant violated the conditions of his probation. While in jail, appellant again violated his probation conditions by contacting S.M.J. eight times by phone. The probation-violation report was amended to reflect this additional contact, and an additional order for arrest and detention was signed on July 8, 2015.

A contested probation revocation hearing was held on April 18, 2016. The state submitted as exhibits several audio files of the jail calls, as well as letters from appellant to S.M.J.; the state called S.M.J. and appellant's probation officer to testify. S.M.J. testified that, following appellant's release from jail, he contacted her "many times" by phone. She also testified that appellant came to her home and grabbed her, telling her that he loved her and that he would kill her and her children. S.M.J. testified that, between his release from jail in March 2015 and his arrest in June 2015, he beat her up many times, and that one of those beatings had induced a miscarriage. S.M.J. also testified about the jail calls following appellant's arrest, explaining that "as soon as he was in jail," appellant called her on her cell phone and also had other people call her. Appellant's probation officer testified that she believed appellant's conduct was intentional and inexcusable due to the timing of the contact. She recommended that appellant's sentence be executed "because of the violent nature of the offense and because of the continued contact with the victim."

The district court made explicit written findings that appellant had violated his probation conditions when he contacted S.M.J. "several times," and that the violations were

intentional and inexcusable. At sentencing, appellant requested that he be reinstated to probation under a stay of execution of sentence. The district court stated:

I do believe that the public policy favoring probation was not present in this case to begin with because it is a presumptive prison offense. However, [appellant] has clearly demonstrated his nonamenability to probation by his continuing violation of orders for protection and no contact orders and continuing harassment of this victim despite those orders. So, since he phoned her from the jail, it seems highly unlikely that he would not continue to harass her.

The district court revoked the stay of imposition and sentenced appellant to 48 months of prison, executed, less credit for time served.

This appeal followed.

DECISION

Appellant argues that the district court abused its discretion when it revoked his probation. We review a district court's revocation of probation for abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). In deciding whether to revoke probation, a district court must employ "conscientious judgment, not arbitrary action." *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008).

The state must first establish a probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c)(b). If the district court determines that a violation has been established, it may revoke probation upon three findings, often called the *Austin* factors: (1) the defendant violated a specific condition of probation; (2) the violation was intentional or inexcusable; and (3) the need for confinement outweighs policy considerations favoring probation. *Austin*, 295 N.W.2d at 250. These findings must be

made either in writing or on the record. *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005).

Appellant argues that the facts do not support the district court's finding that the need for confinement outweighs the benefits of reinstating appellant to probation. In some circumstances, "policy considerations may require that probation not be revoked even though the facts may allow it." *Austin*, 295 N.W.2d at 250. A district court must balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety," to make this finding. *Id.* This factor is satisfied if (1) "confinement is necessary to protect the public from further criminal activity by the offender," (2) "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 251.

The district court's discussion of the need for confinement and the benefits of probation reflect its concern that appellant repeatedly harassed S.M.J. despite a DANCO order and probation conditions prohibiting contact with S.M.J., and concern that appellant would continue to harass S.M.J. if reinstated to probation. The district court's statements on the record amount to a finding that appellant's confinement is necessary to protect the public from his criminal activity and that the seriousness of his violation would be unduly depreciated if his probation were not revoked. Appellant argues that the district court abused its discretion when it revoked probation rather than sanctioning him at an intermediate level, raising three distinct arguments.

He first points out alternative options available to the district court, including additional jail time and appropriate programming. Appellant does not cite to, and we are not aware of, any legal authority for the notion that probation revocation is inappropriate where a district court has any intermediate sanction available to it. We suppose that there is always some programming short of imprisonment that is possible. The mere existence of alternative sanctions does not mean that the district court abused its discretion by revoking probation.

Second, appellant claims he demonstrated an ability to avoid further violations “by having no contact with [S.M.J.] for over ten months prior to his probation being revoked.” A period of good behavior does not nullify appellant’s repeated and serious violations of probation, and the district court acted within its discretion by determining that reinstatement to probation would jeopardize S.M.J.’s safety.

Finally, appellant argues that the severity of his violations was mitigated by his own “confusion over what the condition entailed and the fact that the contact may have been mutual.” The record does not support appellant’s argument. The DANCO and the no-contact condition of probation were explained to appellant at his sentencing, and appellant actively engaged in a discussion about the geographic parameters of the provision. He then told the court he understood the no-contact provision. Accordingly, we conclude that the district court acted within its discretion in determining that appellant’s violation was serious enough that the need for confinement outweighed the policy considerations favoring continued probation.

The four issues raised in appellant's pro se brief do not change our conclusion. First, his arguments concerning his plea agreement were fully considered and resolved in appellant's direct appeal. *Osman*, 2015 WL 9437517 at *3. We will not revisit that decision here. *C.f. State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (barring appellants from raising issues in a postconviction petition that were already raised on appeal). Second, appellant argues that S.M.J. wanted contact with him. But the victim's feelings about the contact are not pertinent to the district court's determination that appellant violated the no-contact provisions imposed by the court. Next, appellant argues that the district court improperly sustained an objection during his attorney's cross-examination of a witness, thereby preventing additional questioning concerning other issues. In fact, the court did not sustain the objection in question.¹ Finally, appellant argues that he should have received a jury trial on the DANCO violation rather than a probation revocation hearing. He was not charged with a separate DANCO violation, and the probation-violation hearing concerned the violation of the no-contact condition of appellant's probation. As such, the district court properly resolved the probation-violation issues without a jury.

Because the district court acted within its discretion in determining that the need for confinement outweighs the policy considerations favoring continued probation, and because appellant's pro se arguments are unavailing, we affirm.

Affirmed.

¹ Appellant may have construed the district court as having sustained the objection, because the questioning did not proceed as appellant had apparently hoped.