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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0239**

State of Minnesota,
Respondent,

vs.

Timothy Ivan Kotten,
Appellant.

**Filed August 28, 2017
Affirmed
Larkin, Judge**

Brown County District Court
File No. 08-CR-13-260

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

Charles W. Hanson, Brown County Attorney, Paul J. Gunderson, Assistant County Attorney, New Ulm, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's revocation of his probation, arguing that he did not intentionally or inexcusably violate probation and that the need for confinement does not outweigh the policies favoring probation. We affirm.

FACTS

In March 2013, the state charged appellant Timothy Ivan Kotten with electronic solicitation of a child, a felony offense. The complaint alleged that Kotten chatted online with an officer who led Kotten to believe that she was 13 years old. While chatting with the officer, Kotten exposed his penis and masturbated in front of his webcam. During two additional chat sessions with the officer, Kotten exposed his penis and masturbated in front of his webcam. On the last occasion, Kotten sent the following message to the purported 13 year old: "Would you lay in bed with me while I'm naked?"

In October 2013, Kotten pleaded guilty as charged. The district court stayed adjudication of guilt and placed Kotten on probation for three years. Kotten's probationary conditions included that he "successfully complete outpatient sex offender treatment" and that he "submit to polygraph examinations as directed by [his] treatment provider."

In October 2014, a probation-violation report alleged that Kotten had been terminated from his sex-offender treatment program for failing to make adequate progress. The report indicated that Kotten's treatment program required him to take a sexual-history polygraph examination and that during this examination, he gave deceptive answers. In

November 2014, Kotten agreed to enroll in a different sex-offender treatment program, and the state dismissed the violation.

In June 2015, a probation-violation report alleged that Kotten had been terminated from sex-offender treatment for refusing to attend appointments. The district court found that Kotten had violated probation by failing to complete a sex-offender treatment program. The district court adjudicated Kotten guilty of the child-solicitation offense, stayed imposition of sentence, ordered him to serve 30 days in jail, and reinstated probation with additional terms.

Kotten appealed the revocation to this court, arguing that “requiring him to attend a sex-offender treatment program that mandates that he submit to a polygraph examination violates his constitutional privilege against self-incrimination.” *State v. Kotten*, No. A16-0074, 2016 WL 3462074, at *3 (Minn. App. June 27, 2016), *review denied* (Sept. 20, 2016). This court rejected his argument, reasoning:

Minnesota law provides that polygraph testing is a permissible condition of probation for sex offenders on probation or conditional release. Minn. Stat. § 609.3456 (2014). Where, as here, sex-offender treatment is required as a condition of probation, it is axiomatic that the treatment program may contain a polygraph requirement specifically authorized by statute.

Id. at *4. This court noted that Kotten was twice “terminated from [a sex-offender treatment program], refused to continue treatment with [another program], and was not enrolled in a sex-offender treatment program at the time of the violation hearing.” *Id.* at *3. This court concluded that Kotten’s refusal to take a polygraph examination was not a valid excuse for avoiding treatment and affirmed the revocation. *Id.* at *4, *6.

Two more probation-violation reports were filed in 2016. A January report alleged that Kotten had attended an initial intake appointment for a sex-offender treatment program but declined to start treatment. An August report alleged that Kotten had met with a probation agent and indicated that he was not in treatment and that he had no desire to seek out treatment. In September, the district court extended Kotten's probationary term beyond its October 14, 2016 expiration date, pending resolution of the alleged probation violation. In October, an addendum to the August report alleged that a probation agent met with Kotten and that Kotten declined the agent's offer to refer him to a sex-offender treatment program.

In December 2016, the district court held a probation-revocation hearing. Kotten testified that he had considered four sex-offender treatment programs and that he disagreed with the treatment conditions for each program. During cross-examination, Kotten admitted that he declined his probation agent's offer to help him find a sex-offender treatment program because all the treatment programs that Kotten had contacted "require[d] [him] to pass a polygraph."

The district court found that Kotten had "intentionally and inexcusably violated the probation condition that he complete sex offender treatment." The district court also found that Kotten "was clearly aware of his obligation to complete sex offender treatment, having been advised of this obligation at the time of sentencing, having violated this condition previously and having appealed the prior violation on this very condition." Lastly, the district court found that "[i]t would unduly depreciate the seriousness of [Kotten's] violation if his probation were not revoked," reasoning that "[s]ex offender treatment is a

central part of [his] probation,” that Kotten’s refusal “to attend treatment except on his terms demonstrates he is unamenable to probation,” and that “[f]ailure to execute [his] sentence would essentially reward him for his continuing defiant refusal to reenroll in treatment.” The district court revoked Kotten’s probation and sentenced him to serve 15 months in prison.

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). “The decision 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.* at 251 (quotation omitted). Before a district court may revoke a defendant’s probation, it “must (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 state must prove a probation violation by clear-and-convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)b, 3(1); *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

Kotten challenges the district court’s findings regarding the second and third *Austin* factors and has filed both a principal and pro se brief. Because the arguments in Kotten’s pro se brief are duplicative of those in his principal brief, we do not distinguish between the arguments in this opinion.

I.

Kotten challenges the district court's finding regarding the second *Austin* factor, contending that "[t]he record does not establish by clear and convincing evidence that [he] intentionally and inexcusably violated the probation condition by not completing treatment." Specifically, he argues that he could not find a treatment program that was "suitable" to his needs.

The flaw in Kotten's argument lies in his implicit definition of "suitable." By suitable he seems to mean a program that would not require him to do anything with which he disagrees. Specifically, he will not agree to a treatment program that would require him to take a polygraph examination, discuss his chemical-use history, or answer questions about mental-health issues in his family, or one that would "unduly restrict his freedom."

We have considered Kotten's explanation for his refusal to agree to these treatment requirements, but we cannot say that the district court erred by finding that Kotten intentionally and inexcusably violated probation. *See, e.g., Kotten*, 2016 WL 3462074, at *4 (rejecting Kotten's argument that requiring him to complete a sex-offender treatment program with a polygraph component violates his constitutional rights). Although there may be circumstances in which a particular treatment program is not suitable to an offender's particular needs, those are not the circumstances here. The record evidence suggests that the requirements to which Kotten objects are standard requirements of sex-offender treatment programs in Minnesota. Kotten's disagreement with the appropriateness of these requirements does not support his conclusion that the programs are not suitable to his needs. It supports the conclusion that Kotten made a deliberate

choice not to complete standard sex-offender treatment. On this record, clear-and-convincing evidence supports the district court's finding that Kotten intentionally and inexcusably violated probation by failing to complete sex-offender treatment.

II.

Kotten also challenges the district court's finding regarding the third *Austin* factor, contending that "[t]he policies favoring probation were not outweighed by the need for confinement."

In assessing the third *Austin* factor, the district court determines whether "confinement is necessary to protect the public from further criminal activity by the offender," "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Austin*, 295 N.W.2d at 251 (quotation omitted).

Kotten challenges the district court's finding that not revoking his probation would unduly depreciate the seriousness of the violation. A comparison of the circumstances here and those in Minnesota's seminal probation revocation case, *State v. Austin*, is useful. Probationer Austin was convicted of burglary and aggravated assault. *Id.* at 248. His probation officer required him to enter a drug-treatment program or return to jail. *Id.* at 248-49. Austin failed to do either. *Id.* at 249. At the probation-revocation hearing, the director of the treatment program testified that he would still accept Austin into the program, even though he had failed to enroll as directed. *Id.* Despite this testimony, the district court revoked Austin's probation and executed his sentence. *Id.* The Minnesota Supreme Court affirmed the revocation, reasoning in part that Austin had "been offered

treatment but ha[d] failed to take advantage of the opportunity or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed.” *Id.* at 251. The supreme court concluded that “the record shows the seriousness of his violation would be denigrated if probation were not revoked,” and that “policy considerations required revocation.” *Id.*

Kotten’s refusal to complete sex-offender treatment is arguably more serious than Austin’s failure to enter drug treatment or return to jail. Kotten’s treatment was directed at the conduct that underlies his conviction, whereas Austin’s drug treatment was directed at secondary factors that likely contributed to his offenses. And Austin violated his condition regarding treatment only once, whereas Kotten previously violated the condition that he complete sex-offender treatment. Similar to Austin, Kotten was offered treatment but failed to take advantage of the opportunity to show a commitment to rehabilitation. It is therefore reasonable to conclude that treatment has failed and that the seriousness of the violation would be denigrated if probation were not revoked.

Kotten argues that because he did not commit a new offense during his probationary term, “[t]he only reasonable conclusion” is that the sex-offender treatment condition was inappropriate and “should have been removed as a condition of probation.” He further argues that “[t]he goal of outpatient sex offender treatment is . . . to prevent the offender from reoffending” and that he has “remained law abiding completely on his own free will, whether in treatment or out of treatment, with no relapse.” Essentially, he contends that his failure to complete treatment should not serve as a basis for revocation because he has not reoffended.

We disagree. Kotten's prison term was not stayed solely on the condition that he remain law abiding. The district court ordered Kotten to complete sex-offender treatment as a condition of probation. Kotten never challenged the imposition of that condition in district court. It is too late for him to do so now. *See State v. Anderson*, 733 N.W.2d 128, 138-39 (Minn. 2007) (declining to consider a challenge to the validity of a probationary condition because the challenge was not raised and determined in district court); *see also State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (stating that appellate courts generally do not consider matters raised for the first time on appeal). Even though the state does not allege that Kotten has reoffended, he has nonetheless violated a condition of probation by failing to complete sex-offender treatment. And, as the district court reasoned, this condition was a "central part" of Kotten's probation. The district court's refusal to reward Kotten's avoidance of sex-offender treatment during his probationary term was not an abuse of discretion.

In sum, Kotten's persistent refusal to complete sex-offender treatment before the expiration of his probationary term establishes that he cannot be counted on to avoid antisocial activity. The district court therefore did not err by revoking Kotten's probation.

Affirmed.