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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1298**

State of Minnesota,
Respondent,

vs.

Michael Christian Robert Foss,
Appellant.

**Filed April 9, 2018
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Anoka County District Court
File No. 02-CR-12-1710

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's order revoking his probation and executing his sentence for two counts of possession of pornographic works involving a minor. Appellant argues that the district court erred by revoking his probation because community programming was available to address appellant's alcohol use. Appellant also argues that the district court should not have imposed two sentences because his offenses occurred during a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

On March 6, 2012, respondent State of Minnesota charged appellant Michael Christian Robert Foss with third-degree criminal sexual conduct, alleging that he engaged in unwanted sexual penetration with H.E.R., a 14-year-old minor. Foss was 19 years old at the time of the alleged penetration. Later, the state amended the complaint to include three counts of possession of pornographic works involving a minor, after three sexually explicit images of H.E.R. were discovered on Foss's cellphone.

On March 3, 2014, Foss pleaded guilty to two counts of possession of pornographic works involving a minor. On September 11, the district court stayed adjudication of guilt, ordered Foss to serve 60 days in a county jail, and placed him on supervised probation for five years. The district court imposed the following conditions of probation: remain law abiding and of good behavior; follow conditions of the probation agreement; meet with his probation officer as directed; have no contact with H.E.R., her family, or minor females; complete a psychological evaluation and polygraph examination, and follow all resulting

recommendations; submit to random chemical testing; do not use mood-altering substances unless prescribed by a doctor; do not use alcohol; perform 100 hours of community work service; pay restitution to the county's sexual-assault fund; and submit to searches of his phone, computer, or other devices with internet access.

On April 17, 2015, Foss's probation agent filed a probation-violation report alleging that Foss violated probation by using marijuana and alcohol. The probation-violation report stated that Foss's adjustment to probation had been "marginal" and that Foss had not entered sex-offender treatment or completed any of his community work service. The report stated that Foss had cancelled his sex-offender treatment intake session due to illness, but that when the agent visited Foss that same day, Foss did not appear to be ill. Foss's probation agent demanded a urine sample, which tested positive for marijuana and alcohol. That was the second time Foss had tested positive for marijuana while on probation.

On July 16, Foss admitted that he violated probation by using mood-altering chemicals without a prescription. The district court found that Foss's violations were intentional and inexcusable, revoked the stay of adjudication, stayed imposition of sentence, and continued Foss on probation.

On July 7, 2016, Foss waived his right to a probation-revocation hearing and admitted that he violated probation by having contact with female minors without approval. The district court once again continued him on probation.

On January 31, 2017, Foss's probation agent filed a violation report indicating that Foss was terminated from sex-offender treatment on December 28, 2016, because he failed

to attend treatment sessions, admitted viewing pornography, and admitted consuming alcohol. On April 10, the agent updated the probation-violation report, alleging that since the last violation report, Foss had refused to submit to five requests for chemical testing. Additionally, Foss had failed to meet with his agent as directed and had been arrested for driving while impaired. The agent recommended that Foss's sentence be imposed and stayed, and that he serve 180 days in custody.

Foss's probation-violation hearing was scheduled for April 18, 2017. Foss failed to appear at the hearing. Foss appeared for a hearing on May 24 and admitted that he violated probation by failing to complete sex-offender treatment, by using alcohol, by not submitting to random testing, and by failing to maintain contact with his probation officer. The district court revoked Foss's stay of imposition and sentenced him to serve 15 months in prison on one of his offenses and 20 months in prison on the other offense, concurrently. Foss appeals the revocation of his probation and his sentence.

D E C I S I O N

I.

Foss contends that the district court abused its discretion by revoking his probation. 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 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). "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." *Austin*, 295 N.W.2d 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. In assessing the third *Austin* factor, the district court should consider 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." *Id.* at 251 (quotation omitted). Whether the district court has made the required *Austin* findings is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

The district court found that Foss had violated probation by failing to complete sex-offender treatment, by using alcohol, by failing to submit to chemical testing, and by failing to meet with his probation agent. The district court also found that the violations were inexcusable. As to the third *Austin* factor, the district court explained:

The third factor is the determination whether the public policy considerations which favor probation are outweighed by the need for incarceration. This involves issue[s] of public safety. It involves issues of consideration of the seriousness of the crime involved.

If I were looking at some other type of case, the alcohol use violations would probably suggest further chances of treatment. But public safety here is not only the risk the defendant may drink and drive, it's also the risk that in an inebriated condition, his judgment may also fail him, and he'll commit another sex offense. He is currently a non-treated sex

offender. He's had an alcohol problem, which he has not been able to control. And, based upon that, the Court is finding that the third *Austin* factor has been satisfied.

Foss challenges the district court's third *Austin* finding, arguing that "[t]he need for confinement did not outweigh the policies favoring probation." Foss asserts that the district court "did not undertake a serious review of the third *Austin* factor." Foss argues that *Modtland* "direct[s] courts to consider whether it would unduly depreciate the seriousness of the violation if probation were not revoked" and notes that "the district court did not actually evaluate and weigh" whether "keeping Foss on probation would unduly depreciate the seriousness of the violations." (Emphasis omitted.)

Modtland does not mandate consideration of that criterion. *Modtland* says, "[C]ourts must balance the probationer's interest in freedom and the state's interest in [e]nsuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *Id.* at 607 (quotation omitted). In balancing these competing interests, *Modtland* instructs that

courts *should* refer to the following found in the American Bar Association Standards for Criminal Justice regarding probation:

Grounds for and alternatives to probation revocation.

(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender 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.

Id. (emphasis added) (quoting *Austin*, 295 N.W.2d at 251).

Thus, *Austin* and *Modtland* encourage, but do not require, the district court to consider the three criteria above, and there is no requirement that the district court consider all three. Generally, unless there is some ambiguity surrounding the use of the word “or,” appellate courts read it in the disjunctive. See, e.g., *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000) (“[I]n the absence of some ambiguity surrounding the . . . use of the word ‘or,’ [appellate courts] will read it in the disjunctive.”). Here, the district court considered Foss’s repeated violations and determined that confinement is necessary to protect the public from further criminal activity. It was not necessary for the district court to also consider whether it would unduly depreciate the seriousness of the violation if probation were not revoked.

We note that the district court did not revoke Foss’s probation until he failed to follow probationary conditions for the third time. Foss’s arrest for driving while impaired, his refusal to meet with his agent and submit to chemical testing, his use of alcohol, and his termination from sex-offender treatment all support the district court’s determination that confinement is necessary to protect the public from further criminal activity.

Foss also argues that the district court erred in revoking his probation because *Austin* states that “revocation should be used only as a last resort when treatment has failed,” and “[t]he court did not find, nor could it find, that chemical dependency programming was unavailable to Foss in the community.” However, district courts are not prohibited from

revoking probation if alternative treatment options exist, and the district court has “broad discretion in determining if there is sufficient evidence to revoke probation.” *Austin*, 295 N.W.2d at 249. Here, the district court considered “further chances of treatment” based on Foss’s alcohol use, but it determined that the risks to public safety were too great given the underlying offense. In doing so, the district court complied with the instructions set forth in *Austin*. The district court did not abuse its discretion in revoking Foss’s probation.

II.

Foss contends that we must vacate his 20-month sentence under Minn. Stat. § 609.035 (2010), which provides that, subject to various exceptions, “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1. Thus, the law generally “prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quotation omitted).

The state bears the burden of proving, by a preponderance of the evidence, that a defendant’s offenses were not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). Whether the offenses were part of a single behavioral incident is a mixed question of law and fact; we review the district court’s findings of fact for clear error and its application of the law to those facts de novo. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). Determining whether multiple offenses are part of a single behavioral incident is not a “mechanical” exercise, but rather requires an examination of all the facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

Foss did not raise application of Minn. Stat. § 609.035 in district court. However, “the prohibition against double punishment in section 609.035 cannot be waived.” *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984). “[A]n appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). Furthermore, courts are empowered “at any time” to correct sentences not authorized by law. Minn. R. Crim. P. 27.03, subd. 9.

Neither party suggests that we should remand to the district court for a single-behavioral-incident determination. Instead, the parties argue that the current record supports their respective positions regarding that determination. When the material facts are not in dispute, we review de novo the district court’s application of section 609.035. *State v. Reimer*, 625 N.W.2d 175, 176 (Minn. App. 2001). We therefore consider application of section 609.035 for the first time on appeal, based on the existing record.

Because this case involves application of section 609.035 to convictions of possession of pornographic works involving minors, *State v. Bakken* is instructive. 883 N.W.2d 264 (Minn. 2016). In *Bakken*, the supreme court determined that the defendant’s conduct in possessing seven pornographic works was not part of a single behavioral incident and that defendant could therefore be sentenced on each possession conviction. *Id.* at 266, 272. The court stated,

When, as here, all of the crimes at issue contain an intent element, we determine whether the crimes were part of a single behavioral incident by considering (1) whether the offenses occurred at substantially the same time and place and

(2) whether the conduct was motivated by an effort to obtain a single criminal objective.

Id. at 270 (quotations omitted). As to the time of possession, the supreme court explained, “Although a crime of possession is a continuing offense, it is complete when the offender takes possession of the prohibited item.” *Id.* (citation omitted).

In *Bakken*, the defendant’s offenses were committed in the same place. *Id.* However, he did not commit each of the possession crimes at substantially the same time: two of the offenses were completed five days apart and other offenses were separated by over a month. *Id.* As to single criminal objective, the supreme court stated, “the mere fact that he committed multiple crimes over time for the *same* criminal objective does not mean he committed those crimes to attain a *single* criminal objective.” *Id.* at 271. The supreme court noted that “because Bakken’s offenses were completed at substantially different times, other cases in which [it had] concluded that an offender had a single criminal goal in committing multiple offenses over a shorter, discrete time period are inapposite.” *Id.* (citing *Langdon v. State*, 375 N.W.2d 474, 476 (Minn. 1985) (reasoning that a defendant’s “overall criminal objective” was “to steal as much money as he could that afternoon” by burglarizing several laundry rooms in the same apartment complex); *State v. Herberg*, 324 N.W.2d 346, 347, 349 (Minn. 1982) (reasoning that a defendant’s “underlying motivation remained the same” in committing multiple violent offenses against the same victim over the course of an afternoon).

The supreme court explained that “[i]n cases in which an offender repeatedly commits the same offense . . . the timing of those offenses is relevant to determining

whether the offender had a *single* criminal objective, or merely the *same* criminal objective.” *Bakken*, 883 N.W.2d at 271 n.5. *Compare Langdon*, 375 N.W.2d at 476 (concluding that four burglaries of an apartment complex on the same afternoon were committed with a single “overall criminal objective”), with *State v. Eaton*, 292 N.W.2d 260, 266-67 (Minn. 1980) (concluding that two thefts, committed three days apart by swindling the same victims, were not committed with a single criminal objective).

The supreme court rejected Bakken’s reliance on *State v. Carlson*, 291 Minn. 368, 369-70, 381, 192 N.W.2d 421, 423, 429 (1971), which held that possession of 29 obscene films, all discovered by police at the same time, could support only one sentence for possession of obscene material with intent to sell. *Bakken*, 883 N.W.2d at 272. The supreme court explained that *Carlson* was easily distinguishable because there was no indication that the defendants in *Carlson* possessed the films or offered them for sale at any time or place other than when and where they were discovered by police. *Id.* “[B]y contrast, Bakken began his possession of the pornographic works at different times.” *Id.* The supreme court concluded that “because Bakken’s offenses were completed at substantially different times, and because his conduct was not motivated by an effort to obtain a single criminal objective, the district court did not err in sentencing Bakken on each of the separate possession convictions.” *Id.*

Foss argues that he should not have received multiple sentences because the facts of his case are analogous to those in *Carlson*. Foss argues:

[He] admitted to possessing two images of H.E.R. on March 2, 2012. He admitted to possessing these two images on a single device, a cellular telephone. He admitted that H.E.R. had sent

these images to him via text message sometime “around” February of 2012, and that he was in “ongoing communication” with H.E.R. . . . This was not a case where a defendant downloaded various images of child pornography at various times, and then admitted to those specific discrete dates, separated by a time period of weeks or months. *See, e.g., State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). Foss did not admit to any separation in time between the text messages that H.E.R. sent to him.

Foss further argues:

Notably, the state did not allege that these were separate behavioral incidents. The complaint did not allege that there was any separation in time between Foss’s receipt of the two images, nor did the state seek such an admission during the plea colloquy. . . . The complaint specifically charged him with possessing these images on or around March 2, 2012, and he specifically pled guilty to possessing them on or around March 2, 2012. This was a single behavioral incident, and so [he] should only have received a single sentence of 15 months. The 20-month sentence must be vacated.

The state counters, “The amended complaint filed by the state on January 17, 2013, however, specifically alleged that Foss received photos from H.E.R. on three separate dates: February 3, 2012, February 5, 2012, and February 7, 2012.” The state argues that because the district court accepted Foss’s guilty pleas, he “in effect judicially admitted the allegations contained in the complaint,” quoting *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983). The state notes that Foss’s factual bases for his guilty pleas confirmed that he possessed the images in February 2012. The state concludes, “The factual basis and criminal complaint show that Foss possessed pornographic works involving a minor on multiple dates, and his sentence must be affirmed.”

The record does not support the state's argument. The relevant portion of the probable cause statement is as follows:

One photograph dated February 3, 2012 depicted [H.E.R.] engaged in sexual conduct. . . . Another photograph identified in the forensic report . . . dated February 5, 2012 depicted [H.E.R.] engaged in sexual conduct. Another photograph dated February 7, 2012 . . . depicted [H.E.R.] engaged in sexual conduct. [H.E.R.] confirmed that she took the photographs and sent them to [Foss] via text message.

The complaint charged three counts of possession of pornographic works and alleged that they occurred on the same date, March 2, 2012. The February dates on which the state relies are the dates of the three photographs underlying the possession charges. The probable cause statement does not allege that Foss received one photograph on each of those three dates. In fact, the complaint is silent regarding when the images were sent and received. The state did not further amend the complaint or offer any evidence to establish when Foss received the images.

Moreover, the factual bases for Foss's guilty pleas do not establish that he received the images on different dates. The state did not ask Foss to clarify that he received the images on different dates or that there was a significant period of time between his receipt of the three images. Instead, the state asked, "[T]he time frame [when] you received these images, it was sometime before March 2nd, correct?" Foss admitted that he received the images "[s]ometime [in] February, 2012" but he did not indicate that he received the images on any specific date or on two or more dates. As to the date of possession, Foss specifically admitted that he possessed both images on March 2, 2012.

THE COURT: Mr. Foss, there was more than one image?

FOSS: Yes.

THE COURT: You've been charged with possession of a pornographic work involving minors To count two, possession of pornographic work involving minors, occurring on or about March 2, 2012, in Anoka County, how do you plead; guilty or not guilty?

FOSS: Guilty.

THE COURT: And to count three, possession of pornographic work involving minors occurring *at the same time and the same place*, how do you plead; guilty or not guilty?

FOSS: Guilty.

(Emphasis added.)

In sum, the complaint alleged that Foss possessed the images that underlie his two possession convictions on March 2, 2012. Although the complaint also alleged that the images were dated February 3, February 5, and February 7, 2012, it did not allege that Foss received the images on those dates. And although Foss admitted receiving the images in February, he did not admit that he received them on different days. There is no claim that Foss possessed the images at different locations.

In deciding this issue, we rely on *Bakken*, which heavily focused on the timing of the possession offenses. See *Bakken*, 883 N.W.2d at 272. Here, the state has not established any lapse of time between the two admitted possession offenses or that Foss had more than one criminal objective when he committed the two acts of possession. "Until the state provides evidence that [a defendant's] acts were separate and distinct criminal offenses, it should be assumed that they were part of a single behavioral act." *State v. Johnson*, 653 N.W.2d 646, 652 (Minn. App. 2002). Because there is no admission or evidence indicating that Foss committed the two possession offenses at different times, the

state has not met its burden of demonstrating that they were distinct criminal offenses. We therefore conclude that the two images were possessed during a single behavioral incident.

This conclusion does not end our analysis. The state contends that sentencing on both offenses was proper despite section 609.035, because “the plea agreement implicitly called for both sentences to be executed if Foss failed on probation.” The state notes that it agreed not to pursue the remaining charges of third-degree criminal sexual conduct and a third count of possession of a pornographic work involving a minor in exchange for Foss’s guilty pleas to the two possession charges. The state argues, “If Foss does not receive concurrent sentencing on both counts of possession of pornographic work[s] involving a minor, the state will not receive the benefit of its bargain in its plea agreement with Foss.” Foss disputes that the plea agreement called for two sentences.

We need not resolve the parties’ dispute, because the state has not provided, and research has not uncovered, authority establishing that the prohibition of multiple punishments under section 609.035 can be waived by a defendant or that a court can ignore the prohibition based on a plea agreement. The state cites caselaw regarding enforcement of plea agreements, but it is not on point. *See State v. Wukawitz*, 662 N.W.2d 517, 519 (Minn. 2003) (holding that imposition of a conditional-release period that does not strictly comply with statute is allowed when withdrawal of a plea would unduly prejudice the state, and expressly limiting the holding to situations where imposition of a conditional-release period would violate the plea agreement); *State v. Brown*, 606 N.W.2d 670, 674-75 (Minn. 2000) (stating that a plea agreement was not violated when unaccounted-for conditional-release term exceeded the plea agreement’s maximum term, because the opportunity for

probation, not the duration of the sentence, induced the plea); *State v. Meredyk*, 754 N.W.2d 596, 605 (Minn. App. 2008) (holding that the district court erred by modifying a discretionary restitution order because the defendant agreed to a specific amount of restitution under the plea agreement).

Our research suggests that it may be improper to rely on a plea agreement as a basis to refuse to correct a sentence that violates section 609.035. For example, in *State v. White*, the supreme court unequivocally stated that “the prohibition against double punishment cannot be waived.” 300 Minn. 99, 106, 219 N.W.2d 89, 93 (1974). In *Johnson*, we stated, “because *White* unequivocally declared the prohibition against double punishment cannot be waived, we hold that [a defendant] cannot waive the prohibition against double punishment found in Minn. Stat. § 609.035 by failing to assert such a claim in his direct appeal.” 653 N.W.2d at 651. But we qualified that holding, stating, “We do not purport to decide whether the prohibition on double punishment may *ever* be waived, only that the *Knaffla* rule does not bar a subsequent attack on multiple sentencing.” *Id.* at 651 n.2. Our research does not indicate that this court, or the supreme court, has ever revisited the issue.

Thus, the state’s contention that a defendant can waive the sentencing protection of section 609.035, and thereby relieve the state of its burden to prove that multiple offenses were not committed during a single behavioral incident, raises an issue of first impression. Caselaw holding that a plea agreement, standing alone, cannot be the basis for a sentencing departure may have some relevance. *See, e.g., State v. Misquadace*, 644 N.W.2d 65, 66 (Minn. 2002) (holding that a district court errs “by basing its departures from the presumptive sentences under the Minnesota Sentencing Guidelines solely on a plea

agreement without additional substantial and compelling justification for departure”). If such a waiver were allowed, caselaw suggests that it should “conform to the usual limitations accompanying the waiver of constitutional or statutory rights, that is, it must be knowing, intelligent, and voluntary.” *See State v. Givens*, 544 N.W.2d 774, 777 (Minn. 1996) (describing requirements for waiver of right to be sentenced under sentencing guidelines), *superseded by statute*, 1997 Minn. Laws ch. 96, § 1, at 694-95, *as recognized in Misquadace*, 644 N.W.2d at 65. Unfortunately, neither party provides adequate briefing on these issues.¹

Given the limited legal analysis presented by the parties, we do not attempt to determine, for all purposes, whether a sentence that violates the multiple-punishment prohibition of section 609.035 may be based solely on a plea agreement. For the purpose of this case, we conclude that, if the state wanted to maintain the benefit of its purported bargain with Foss, it should have met its burden to establish that the two admitted possession offenses were not committed during a single behavioral incident such that sentencing on both offenses would not violate section 609.035. Because the state failed to do so, Foss’s second sentence for 20 months violates Minn. Stat. § 609.035.

Conclusion

Because the district court did not clearly abuse its discretion by revoking Foss’s probation, we affirm in part. However, because the state did not establish that the two

¹ Because oral argument was not requested, the legal arguments are limited to the briefs.

sentenced offenses were committed during separate behavioral incidents, we reverse in part and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.