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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1924**

State of Minnesota,
Respondent,

vs.

David Lawrence Pillatzki, Jr.,
Appellant

**Filed August 6, 2018
Affirmed
Worke, Judge**

Kandiyohi County District Court
File No. 34-CR-13-10

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

Shane D. Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney,
Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Charles Donovan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by revoking his
probation. We affirm.

FACTS

Appellant David Lawrence Pillatzki, Jr. is ineligible to possess a firearm. After officers found a video on Pillatzki's Facebook page of him shooting a semi-automatic assault-type rifle, he was charged with two counts of ineligible person in possession of a firearm.

In February 2013, the district court held a plea hearing. In addition to the felon-in-possession-of-a-firearm charges, Pillatzki had four pending criminal matters. The parties negotiated a global resolution, with the state agreeing to a downward dispositional departure. Pillatzki pleaded guilty to one count of felon in possession of a firearm and the state dismissed the second count. He also pleaded guilty to fleeing a peace officer in a motor vehicle, two counts of driving after cancellation—inimical to public safety, and fifth-degree possession of a controlled substance.

A presentence investigation (PSI) outlined Pillatzki's extensive criminal history. Pillatzki's criminal history includes felonies for second-degree burglary, motor-vehicle theft, driving while impaired (DWI), DWI test refusal, fifth-degree controlled-substance possession, and fleeing a police officer in a motor vehicle. The majority of Pillatzki's convictions were related to his drug and alcohol use. Pillatzki completed inpatient treatment programs three times, twice while incarcerated. Pillatzki was unsuccessfully discharged from one attempt at outpatient treatment in 2012. In summary, the PSI noted that Pillatzki has been in the criminal-justice system since he was 13 years old, and the longest period of time that he had been free from some form of incarceration was 18 months. "Pillatzki [saw] himself as institutionalized" and "not able to handle the daily

stresses of living free in the community and when not able to handle the stresses he turns to drugs or alcohol.”

On April 15, 2013, the district court sentenced Pillatzki to the presumptive sentence of 60 months in prison, but granted Pillatzki a downward dispositional departure and stayed execution of the sentence. The district court stated that it would give Pillatzki a chance to “be clean and sober” and take seriously the fact that most of his crimes involved drugs and/or alcohol. The district court placed Pillatzki on probation for ten years, informing him that if he violated it could result in execution of his prison sentence. Conditions of Pillatzki’s probation required him to, among other things, not use or possess alcohol or mood-altering chemicals, submit to random drug and alcohol testing, and remain law abiding.

On April 6, 2017, a probation-violation report was filed, alleging that on April 1, Pillatzki was pulled over for an equipment violation and, after the officer detected alcohol on Pillatzki’s breath, Pillatzki refused to submit to an alcohol test. On August 24, an addendum to the violation report was filed, alleging that Pillatzki had been charged with several controlled-substance crimes.

At the probation-revocation hearing, Pillatzki admitted that he violated his probation on April 1 by driving a vehicle after drinking alcohol and refusing alcohol testing. The district court noted that, although the criminal charges were dismissed due to an issue with the stop, Pillatzki violated his probation by driving a vehicle after consuming alcohol and refusing the alcohol test. The prosecutor noted that Pillatzki also had a misdemeanor assault conviction in 2016 and that Pillatzki had been drinking alcohol during the assault.

A violation was not reported on that incident because the parties agreed that Pillatzki would serve ten days.

Pillatzki testified that after his recent conviction he sought treatment and remained sober until he underwent stomach surgeries in 2016 and became addicted to pain medication. Around that time, two of Pillatzki's children moved back in with their mother and his girlfriend ended their relationship. Pillatzki also testified that he was accepted at Teen Challenge, a program significantly longer than past programs he attended. Pillatzki testified that if given an opportunity to complete treatment, he could remain sober.

The district court stated that chemical dependency seemed to be Pillatzki's "demon," and acknowledged the value of Teen Challenge. But the district court found that Pillatzki's issue was that he regularly relapsed, "[a]nd the trouble with [his] relapses are that they involve something that's dangerous" to the public. While recognizing that revocation "should be used only as a last resort when treatment has failed," the district court stated that all of Pillatzki's prior treatments failed. The district court concluded that the need for confinement outweighed the policies favoring probation and was necessary to protect the public from further criminal activity. The district court stated:

[E]very time you go in, you come back out and you engage in more criminal activity. You cannot control yourself apparently. And eventually it comes time where we . . . can't just look at another treatment opportunity because if it fails you endanger others. Every time. And I can't let that . . . keep going on.

The district court revoked Pillatzki's probation. This appeal followed.

DECISION

“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); *see State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (stating that the state must prove a probation violation by clear and convincing evidence).

The district court’s decision to revoke probation “cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender’s behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity.” *Austin*, 295 N.W.2d at 251 (quotations omitted). Before a district court may revoke an offender’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. Pillatzki does not dispute the district court’s findings on the first two *Austin* factors. He argues only that the record does not support the district court’s decision that the need for confinement outweighs the policies favoring probation.

In assessing the third *Austin* factor, the district court should consider whether “confinement is necessary to protect the public from further criminal activity,” “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). Here, the district court determined that

confinement is necessary to protect the public from further criminal activity, and that not executing the sentence would unduly depreciate the seriousness of the violations.

Pillatzki concedes that “[t]he facts here may have supported revoking probation, but policy considerations did not.” Pillatzki argues that the district court appeared to focus on his history of probation violations and treatment failures, but the district court was aware of his history at sentencing when it granted Pillatzki a downward dispositional departure.

At sentencing, the district court was aware of Pillatzki’s extensive criminal history, long history of alcohol and drug use, and treatment attempts. At sentencing, Pillatzki was aware that the district court was giving him a chance to be sober, and that if he violated his probation, it could trigger execution of his sentence. Thus, although the district court was aware of Pillatzki’s history at sentencing, Pillatzki was also aware that he was being afforded a chance to prove that he could be successful on probation.

Moreover, the district court did not focus on Pillatzki’s history of violations and treatment failures; rather, the district court focused on the fact that “the trouble with [Pillatzki’s] relapses are that they involve something that’s dangerous” to the public. The district court stated that when Pillatzki relapsed, he engaged in criminal activity. The district court noted that Pillatzki could not control himself and that another treatment opportunity was not an option because if it failed, Pillatzki would “endanger others” as he has done after prior treatments failed.

The district court determined that it could not let the cycle continue. Caselaw does not preclude consideration of an offender’s pattern of behavior. *See State v. Osborne*, 732 N.W.2d 249, 256 (Minn. 2007) (affirming probation revocation when the district court

considered the offender’s “lengthy history of criminal activity and chronic probation and treatment failures”); *State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (affirming probation revocation, noting prior offenses and history of probation noncompliance), *review denied* (Minn. July 19, 2011).

Additionally, the record supports the district court’s conclusion that Pillatzki’s relapses led to dangerous criminal behavior. Pillatzki has a misdemeanor assault conviction following a relapse in 2016. The April 2017 incident involved Pillatzki driving after consuming alcohol. And the addendum to the probation-violation report stated that Pillatzki was charged with first-, third-, and fifth-degree controlled-substance crimes—sale, attempted sale, and possession. This criminal conduct—assault, DWI, and selling drugs—endangers others. Relapsing by consuming alcohol and being unsuccessfully discharged from treatment are troubling. But a relapse leading to criminal activity that endangers the public is more troubling, which is what the district court focused on when it revoked Pillatzki’s probation.

Pillatzki also argues that, while he had previous probation violations in past cases, this was his first violation in this case and he had been in the community for four years and demonstrated that he could be counted on to avoid antisocial activity. The record does not support this assertion. Although this was Pillatzki’s first reported violation in this case, the prosecutor noted that Pillatzki had been convicted of assault in 2016. Additionally, the law does not prevent a district court from revoking probation based on an offender’s first violation. Although *Austin* describes revocation as a “last resort,” it does not establish a right to one violation without revocation. 295 N.W.2d at 250. Rather, the supreme court

stated that “revocation should be used only as a last resort when treatment has failed.” *Id.* The district court stated that Pillatzki’s several treatments all failed.

Pillatzki argues that his confinement “may temporarily protect the public, but it does not protect the public once [he] is released,” because he needs treatment and the prison treatment programs proved unsuccessful in his case and prison is where he was introduced to methamphetamine. However, revocation of Pillatzki’s probation does not prevent him from seeking additional treatment once he is released from prison. Pillatzki can avail himself of institutional resources and then he may choose to continue treatment once he is released. Further, while Pillatzki claims that his attempts at prison treatment programs were unsuccessful, his PSI shows that he completed two treatment programs while incarcerated, but it was his outpatient-treatment attempt in 2012 that resulted in an unsuccessful discharge.

Pillatzki argues that despite the district court finding that not executing the sentence would unduly depreciate the seriousness of the violations, he relapsed because he was prescribed medications following surgeries and continued to use during a stressful period. Pillatzki argues that the best way to protect the public is to help him to overcome his addiction, which can be done if he is permitted to attend the Teen Challenge program. The district court agreed that the Teen Challenge program is valuable. But Pillatzki’s long cyclical history of treatment, relapse, and criminal activity did not support a determination that he could be successful on continued probation. *See State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming probation revocation when evidence supported district court’s finding that offender was “unamenable to treatment”).

The record shows that Pillatzki has a long history of convictions with the majority related to his drug and alcohol abuse. Pillatzki is currently in his early forties and he has been involved in the criminal justice system since he was 13 years old. The PSI noted that “Pillatzki [saw] himself as institutionalized” and “not able to handle the daily stresses of living free in the community and when not able to handle the stresses he turns to drugs or alcohol.” “When determining if revocation is appropriate, courts must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will.” *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005) (quotations omitted). Here, the district court’s decision was based on sound judgment. The district court did not abuse its discretion in revoking Pillatzki’s probation.

Affirmed.