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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0996**

State of Minnesota,
Respondent,

vs.

Justin David Gruchow,
Appellant.

**Filed February 4, 2019
Affirmed
Cochran, Judge**

Carver County District Court
File No. 10-CR-12-1228

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Angella M. Erickson, Assistant County Attorney,
Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN , Judge

Appellant challenges the district court's order revoking his probation, arguing that
confinement is not necessary to protect the public and his probation violations were

technical in nature. Because the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

On August 14, 2013, appellant Justin Gruchow pleaded guilty to third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2012). He admitted to having sexual intercourse with A.H., who was 15 years old at the time. Gruchow's drug use was a factor in the offense. Immediately following Gruchow's guilty plea, the district court stayed imposition of sentence, placed him on probation for seven years, imposed 60 days of jail time, and required him to complete a psychosexual evaluation and a chemical-dependency assessment and to follow the recommendations. Probation conditions included that he abstain from using controlled substances and submit to testing to verify his compliance. Following his psychosexual evaluation, his probation agreement also included that he complete sex-offender treatment.

In February 2014, Gruchow's probation officer filed a violation report for his failure to undergo urinary analyses (UAs), and failure to appear for multiple appointments. A contested probation violation hearing was held on April 10, 2014. The district court determined that Gruchow failed to complete a chemical-dependency assessment and follow its recommendations, failed to complete his sex-offender treatment, failed to appear for appointments, and failed to complete his UAs. The court further found that these violations were intentional or inexcusable and set a disposition hearing for July 11, 2014.

On June 3, 2014, Gruchow's probation officer filed an additional probation violation report for Gruchow's failure to remain in contact with his agent, failure to abstain from

using illegal substances, and failure to obtain a chemical-dependency assessment. At the July 11 hearing, Gruchow admitted to these violations. The court found Gruchow in violation, reinstated his probation on the same terms and conditions, and imposed six months in jail with the requirement to complete a chemical-dependency program.

In August 2017, Gruchow completed a sanctions conference with his probation officer regarding Gruchow's failure to abstain from using illegal substances after testing positive for marijuana. Following the sanctions conference, the district court ordered that Gruchow complete an updated chemical-dependency assessment and follow its recommendations.

On March 5, 2018, the probation officer filed another probation violation report. The district court held a contested probation-violation hearing where Gruchow admitted to violating his probation by failing to complete sex-offender treatment, failing to complete chemical-dependency treatment, failing to submit to random UAs, and failing to have proper monitoring software on his smartphone. Gruchow testified at the hearing that he was close to completing his sex-offender treatment program when he was terminated. He also explained that he had not started chemical-dependency treatment because he was unable to contact a specific program. He testified that he missed his two random UAs because he was sleeping, and that while his phone was internet capable, he did not use it for pornography and could not afford a monitoring program. But, Gruchow acknowledged that he did not know how much the monitoring program cost.

His former probation officer testified that she did not believe Gruchow was amenable to probation because of his dishonesty and "failure to follow through" in getting

an updated chemical-dependency assessment. His current probation officer also testified that Gruchow was dishonest and failed to make adequate progress with his sex-offender treatment. Gruchow was repeatedly dishonest about why he missed various appointments with probation, and at one point fabricated health problems to explain why he missed a session of sex-offender treatment.

The district court found that Gruchow intentionally violated the terms of his probation, and that the need for confinement outweighed the policies favoring probation. Specifically, the district court found confinement “is necessary to protect the public from criminal activity,” and “it would unduly depreciate the seriousness of this violation if probation was not revoked.” The court revoked his probation, imposed a 48 month sentence, and executed his sentence. This appeal follows.

D E C I S I O N

The district court has “broad discretion in determining if there is sufficient evidence to revoke probation.” *State v. Austin*, 295 N.W.2d 246, 249 (Minn. 1980). This court will reverse a district court’s probation determination only “if there is a clear abuse of discretion.” *Id.* at 249-50.

Before the district court may revoke 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 the need for confinement outweighs the policies favoring probation.” *Id.* at 250. In this case, Gruchow does not dispute that the district court adequately specified the conditions that were violated and properly found that the violations were either intentional or inexcusable. Rather, Gruchow argues that the district

court abused its discretion when it found the need for confinement outweighs policies favoring probation.

When analyzing whether the need for confinement outweighs the policies favoring probation, the district court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quotation omitted). The balancing test will result in revocation if the district court finds 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.” *Austin*, 295 N.W.2d at 251 (citing A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)).

Gruchow challenges the district court’s finding that confinement is necessary to protect the public from further criminal activity and its determination that the seriousness of the violations would be unduly depreciated if probation is not revoked. Gruchow also argues that the district court abused its discretion in failing to order an intermediate sanction rather than revocation of his probation.

I. Revocation based on protection of the public from further criminal activity

Gruchow first argues that the district court abused its discretion by finding that confinement is necessary to ensure public safety. He states that the court’s concern for public safety is unsupported by the record because none of his probation violations “constituted new criminal activity.” Gruchow does not cite to any case law to support his

argument that there must be a new criminal act to justify confinement in the name of public safety. Further, failure to complete sex-offender treatment may support probation revocation even without the commission of a new criminal offense. *See State v. Rock*, 380 N.W.2d 211, 214 (Minn. App. 1986) (holding that the district court “did not abuse its discretion in revoking probation based on appellant’s failure to enter and successfully complete sexual offender treatment”), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 46-47 (Minn. App. 1985) (affirming probation revocation when probationer failed to complete sex-offender treatment and was considered unamenable to treatment).

Here, the district court referenced Gruchow’s termination letter from sex-offender treatment when considering public safety. The termination letter stated that Gruchow was “at risk to recidivate” because he continued “to engage in behaviors which disregard his treatment agreement.” The letter further stated he was considered neither “safe, nor appropriate, to continue to attend outpatient sex offender treatment.” The district court found that confinement was necessary “to protect the public from further criminal activity” because Gruchow was an “untreated sex offender” who was at “a high risk to reoffend.” Because the record supports the district court’s concern for public safety, Gruchow’s first argument fails.

II. Revocation based on the seriousness of the probation violations

Gruchow next argues that the district court abused its discretion by finding that “it would unduly depreciate the seriousness of [the] violation[s] if probation was not revoked.” Gruchow claims his violations were merely technical and do not amount to substantive

reasons for revocation. A 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 or she cannot be counted on to avoid antisocial activity.” *Austin*, 295 N.W.2d at 251 (quotation omitted). Gruchow argues that each of his probation violations were technical in nature.

First, he contends that his termination from sex-offender treatment was for technical, not substantive reasons. Gruchow argues that his violation stemmed from his inability to pay for sex-offender treatment and was “based more on the time he took to complete the program than a substantive failure to participate or to learn from treatment.” The record does not support this argument. While Gruchow was previously terminated from sex-offender treatment because of his inability to pay, the most recent letter from his treatment provider, CORE Professional Services, indicated he was terminated for failure to make adequate progress. The letter further stated that Gruchow used marijuana, viewed pornography, and was “dishonest on several occasions about why he was unable to attend group, even going so far as to claim he had a heart attack and was hospitalized.” Gruchow admitted each of these allegations at the hearing. The record reflects that his most recent termination from sex-offender treatment was for a substantive reason, not for a technical reason.

Gruchow next argues that failing to timely enroll in chemical-dependency programming was a technical violation. There is no evidence in the record to show that Gruchow attempted to enroll in chemical-dependency treatment; while he had three chemical-dependency assessments, he did not follow the recommendations. Further, one

of his probation officers testified at the hearing that his use of substances was a “primary factor in his original offense.” Gruchow’s use of substances was also a component of his termination from sex-offender treatment. Because of his history of substance abuse and its role in the original offense, the record shows that Gruchow’s failure to enroll in chemical-dependency programming was not merely a technical violation.

Finally, Gruchow argues that missing two drug tests and not purchasing monitoring software for his smartphone were technical violations. The record does not support his position. The missed UAs were serious violations given Gruchow was still using drugs and drug use was a factor in his sex offense. Similarly, Gruchow’s failure to purchase monitoring software for his smartphone was a serious violation because the monitoring software is necessary to determine whether Gruchow is accessing pornography. The viewing of pornography can be a trigger for sexual re-offense and is prohibited by Gruchow’s probation agreement.

In summary, given the totality of the circumstances, the record supports the district court’s determination that it would unduly depreciate the seriousness of Gruchow’s violations if his probation was not revoked. The district court’s decision to revoke probation was not “a reflexive reaction to an accumulation of technical violations.” *Austin*, 295 N.W.2d at 251.

III. Consideration of other sanctions short of revocation

Lastly, Gruchow claims that given the “readily available community treatment options, the district court improperly opted for the last resort.” He maintains that an intermediate sanction such as a year in jail with a requirement to participate in

chemical-dependency programming would have been more appropriate. He argues that because he was in the process of setting up chemical-dependency programming and had nearly completed his sex-offender treatment, imprisonment was improper. But, while Gruchow was consistent with his sex-offender treatment plan for a period of time, his probation officer testified that “he did not maintain that” and “he’s been struggling for quite some time now.” Gruchow has had over four years to complete sex-offender treatment but has not been successful in doing so. Most recently, he was terminated for his dishonesty, substance use, and pornography use. Even after repeated warnings following his prior probation violations, Gruchow failed to complete both sex-offender and chemical-dependency treatment, which indicates that probation was not succeeding at rehabilitating him. *See State v. Theel*, 532 N.W.2d 265, 267 (Minn. App. 1995) (stating that a probationer’s “failure to follow the court’s order despite repeated warnings indicates that the probation was not succeeding”), *review denied* (Minn. July 20, 1995). Additionally, Gruchow cites no authority that requires a district court to consider intermediate sanctions before revoking probation. Because the record supports the finding that the need for confinement outweighs the policies favoring probation, the district court did not abuse its discretion in revoking Gruchow’s probation.

Affirmed.