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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1427**

State of Minnesota,
Respondent,

vs.

Shayne Carl Nelson,
Appellant.

**Filed April 15, 2019
Affirmed
Randall, Judge***

Pine County District Court
File No. 58-CR-16-510

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

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and
Randall, Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion in determining that the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

On January 20, 2016, a trooper with the Minnesota State Patrol observed appellant Shayne Carl Nelson driving in Pine County. The trooper was aware that Nelson's driving privileges had been canceled as inimical to public safety. The trooper activated his emergency lights to initiate a traffic stop, and then observed Nelson throw something out of the driver side window before stopping the vehicle. The trooper placed Nelson under arrest and then returned to the location where he saw Nelson throw something out of the vehicle. He discovered an "eight ball" of a substance that field tested positive for methamphetamine.

Respondent State of Minnesota charged Nelson with a third-degree controlled-substance crime and driving after revocation-inimical to public safety. On April 20, 2017, the parties appeared before the district court and indicated they had reached a plea agreement in which Nelson would plead guilty to fifth-degree controlled-substance crime and request a sentence of a year and a day, a downward durational departure. The parties believed that Nelson had enough jail credit to satisfy the sentence without serving additional jail time. Nelson later withdrew the plea because the parties had been mistaken about his amount of jail credit and he no longer wished to move forward with the plea

agreement because it would require him to serve additional time. The parties instead indicated that they had reached a new plea agreement that called for a downward dispositional departure. In November of 2017, the district court accepted Nelson's plea, sentenced him to 21 months in prison, stayed execution of the sentence, and placed him on probation for five years.

On May 10, 2018, the state filed a probation-violation report. The report alleged that Nelson had violated the terms of his probation because he had a new charge for driving after cancellation, he failed to report the arrest to his probation officer, he failed to contact probation as directed and follow all instructions, and he had used methamphetamine. On June 5, the district court held a probation-violation hearing. Nelson admitted that he had failed to remain law abiding because he had a new conviction for driving after cancellation and that he had used methamphetamine. Nelson admitted that the violations were willful. The state dismissed the remaining allegations.

The state requested that the district court revoke Nelson's probation and execute his sentence. Teresa Goebel, his probation officer, recommended that his probation be revoked. She opined that Nelson was "very criminal, rarely is honest and lacks accountability when it comes to his criminality." She also stated that "he has shown over and over again that he is not amenable to community supervision." Nelson argued his probation should not be revoked because he had not failed to comply with treatment recommendations as no treatment had been ordered, he did not pose a risk to public safety, and it would not unduly depreciate the seriousness of the violation if probation were not

revoked. The district court revoked Nelson's probation and executed his sentence. This appeal follows.

DECISION

The district court has broad discretion in determining whether sufficient evidence exists to revoke probation, and we will reverse only if there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). When revoking probation, a district court must: (1) specify the conduct or conditions that the probationer violated; (2) find the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* at 250. 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." *Id.* at 251 (quotations omitted).

Nelson argues that the district court abused its discretion in determining that the need for confinement outweighs the policies favoring probation. When analyzing this factor, a district court must consider that the purpose of probation is rehabilitation, and revocation should be a last resort. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The need for confinement outweighs the policies favoring probation if at least one of three subfactors are met:

- (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.

The district court determined that confinement was necessary to protect the public from further criminal activity and that it would unduly depreciate the seriousness of the violations if Nelson's probation was not revoked. The district court correctly reasoned that Nelson was a risk to public safety because he continued to use methamphetamine and obtained a new criminal conviction. The district court noted that Nelson's driving privileges had been canceled as inimical to public safety, yet he continued to drive. The district court next determined that it would depreciate the seriousness of the violations if probation were not revoked because: (1) Nelson received a dispositional departure; (2) violated the conditions a few months later; and (3) in general had little correctional time left on his sentence. Finally, the district court determined that Nelson had not demonstrated that he was capable of cooperating with probation. The district court noted that when the departure was granted the court was "expecting, quite frankly, very little of you," yet Nelson "failed to remain law abiding, you failed to abstain, and it looks like you have really no intention or plan of how you are going to be cooperative."

Nelson argues that the district court abused its discretion in revoking his probation because there are meaningful alternative sanctions and programming available in the community. He argues that his violations—driving a car without a license and use of methamphetamine—do not show that the public needs to be protected from further criminal activity. We disagree. His driving privileges were revoked as inimical to public safety, and thus the fact that he continues to drive poses a risk to the public. The district court also noted that Nelson had manipulated an older woman into letting him use her vehicle so he

could continue to drive without a license. Members of the public have been affected by his criminal behavior.

Nelson does not directly challenge the district court's determination that it would unduly depreciate the seriousness of the violation if probation were not revoked. But he emphasizes that he merely drove without a license, relapsed in using methamphetamine, and that it had been seven months since sentencing and only one probation-violation report had been filed. Although Nelson was sentenced in November 2017, and the probation violation report was not filed until May 2018, the two violations he admitted to occurred in January and March 2018. Thus, he violated the terms of his probation by receiving a new charge just two months after being granted a downward dispositional departure, and then violated it again two months after that. The fact that Nelson received a downward dispositional departure is appropriate to consider when determining if probation should be revoked. *See State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) ("Fleming complains that the district court considered its grant of a downward dispositional departure when deciding whether to revoke probation. That was a proper consideration."), *aff'd*, 883 N.W.2d 790 (Minn. Aug. 17, 2016).

The district court's primary concern was that Nelson was not even attempting to cooperate with probation. This is supported by the testimony of his probation officer, who stated that Nelson "rarely is honest and lacks accountability" and had shown that "he is not amenable to community supervision." On this record, the district court properly revoked Nelson's probation. The district court provided a thorough explanation of its determination

that the need for confinement outweighed the policies favoring probation, and the record supports this determination.

Affirmed.