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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1584**

State of Minnesota,
Respondent,

vs.

London Lamar Kellogg,
Appellant.

**Filed July 1, 2019
Reversed and remanded
Peterson, Judge***

Hennepin County District Court
File No. 27-CR-16-27906

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

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Peterson, Judge.

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

UNPUBLISHED OPINION

PETERSON, Judge

Appellant challenges the revocation of his probation, arguing that his ten-year conditional-release term constitutes an illegal sentence and that the district court abused its discretion in concluding that the need for confinement outweighs the policies favoring probation. We reverse and remand.

FACTS

In June 2017, appellant London Lamar Kellogg pleaded guilty to failing to register as a predatory offender, in violation of Minn. Stat. § 243.166, subd. 5(a) (2016).¹ On August 3, 2017, the district court sentenced Kellogg to 21 months in prison and imposed a ten-year conditional-release term. The court also granted Kellogg a dispositional departure, stayed execution of the sentence, and placed Kellogg on probation for three years under several conditions.

In late March 2018, a probation-violation report was filed, alleging that Kellogg violated three conditions of probation. The district court held a hearing in early April, and Kellogg admitted the violations. The district court found Kellogg in violation, required four days in jail with credit for four days served, reinstated probation under the same terms and conditions, and added a condition regarding health insurance.

¹ Kellogg was required to register as a consequence of a criminal-sexual-conduct conviction in 2008.

A second probation-violation report was filed in May 2018, alleging that Kellogg violated the probation condition that he remain law abiding because he was charged with fifth-degree drug possession. In early June 2018, Kellogg pleaded guilty to the drug-possession charge.

Later in June, the district court held two hearings to determine whether to revoke Kellogg's probation. Kellogg's attorneys argued at the hearing that Kellogg is an addict in need of treatment, and they asked that he be given an opportunity to continue on probation and treat his addiction, rather than go to prison. They explained that there was a treatment facility, Restoration Counseling & Community Services, LLC (RCCS), that was willing to accept Kellogg on an outpatient basis,² and they proposed that Kellogg be held at the workhouse and be furloughed daily to RCCS to undergo a nine-month drug-treatment program. The prosecutor raised a concern that if Kellogg were to spend nine months—or about 270 days—going through the RCCS program while serving time in the workhouse, he would be given credit against his prison sentence for the days he served in the workhouse and would effectively have only ten days remaining on his executable sentence.³ The concern with this was that it would essentially eliminate any incentive for Kellogg to follow

² RCCS would not accept Kellogg on an inpatient basis because he is a risk level III sex offender.

³ The executable sentence was 21 months. Under the two-thirds rule, Kellogg would serve 14 months in prison, or about 420 days. See Minn. Stat. § 244.01, subd. 8 (2018) (defining “term of imprisonment” as being equal to two-thirds of the executed sentence). But he had 140 days of credit on his sentence for time that he had already spent in custody, which meant that only 280 days remained to be executed at the time of the probation-revocation hearing. See Minn. Sent. Guidelines 3.C & cmt. 3.C.03 (2016) (credit should be awarded for time spent in custody as condition of stay of execution when stay is revoked and offender is committed).

through with the next treatment he was required to undergo—sex-offender treatment. The prosecutor also told the court that an executed prison sentence would result in a ten-year conditional-release period following Kellogg’s release from prison.

The district court shared the prosecutor’s concern that if Kellogg remained on probation, while completing chemical-dependency treatment, there would not be sufficient time remaining on Kellogg’s sentence to provide an incentive for him to complete sex-offender treatment. The district court explained:

Well, Counsel, my—my concern is that there’s no time left, and having a 10-year conditional release period, there will be time to make sure that Mr. Kellogg gets the chemical dependency treatment and the sex offender treatment.

And that’s the biggest—the biggest problem with this whole thing. If there was longer than 280 days left—I just see that Mr. Kellogg didn’t—didn’t move quick enough to get this stuff done.

...

There’s not enough time with 280 days remaining. So I’m going to find that the benefits that were afforded to you at the time that you were given the dispositional departure are outweighed right now. And so I will then commit you on the time that you were given previously.

The district court executed the previously stayed 21-month sentence along with the associated ten-year conditional-release term and credited Kellogg with 140 days already served. This appeal follows.

DECISION

Kellogg argues that his ten-year conditional-release term constitutes an illegal sentence and that the district court abused its discretion by revoking his probation. We

begin by addressing the legality of Kellogg’s sentence. We review the legality of a sentence de novo. *State v. Franklin*, 847 N.W.2d 63, 64 (Minn. App. 2014). We “may at any time correct a sentence not authorized by law.” Minn. R. Crim. P. 27.03, subd. 9.

The predatory-offender registration statute requires a ten-year conditional-release term under certain circumstances. The statute provides:

Notwithstanding the statutory maximum sentence otherwise applicable to the offense or any provision of the sentencing guidelines, *when a court commits a person to the custody of the commissioner of corrections* for [knowingly failing to register] and, at the time of the violation, the person was assigned to risk level III under section 244.052, the court shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for ten years.

Minn. Stat. § 243.166, subd. 5a (emphasis added).

Because Kellogg was assigned to risk level III when he failed to register, the statute requires that, when he is committed to the custody of the commissioner, he shall be placed on conditional release for ten years following his release from prison. But the supreme court has held that, in order to impose such a conditional-release term, there must be either a jury finding or an admission by the defendant that he was a risk-level-III offender when he violated the registration statute. *Reynolds v. State*, 888 N.W.2d 125, 130 (Minn. 2016); *see also State v. Her*, 862 N.W.2d 692, 696 (Minn. 2015). If there is no jury finding or admission about the defendant’s risk level, imposing a ten-year conditional-release term constitutes an illegal sentence. *Reynolds*, 888 N.W.2d at 130.

Kellogg asserts that there was neither a jury finding nor an admission about his risk level at the time of his offense, and our review of the record, including the plea-hearing

and the sentencing-hearing transcripts, confirms that there was neither a jury finding nor an admission. Accordingly, we conclude, and the state concedes, that the ten-year conditional-release term is illegal, and we reverse that portion of Kellogg's sentence.

The district court stated that it based its decision to revoke Kellogg's probation and commit him to the custody of the commissioner in large part on its belief that, upon his release from prison, Kellogg will be subject to a ten-year conditional-release term. Because we have concluded that the ten-year conditional-release term constitutes an illegal sentence, a significant portion of the district court's reasoning no longer applies. Accordingly, we reverse the revocation of Kellogg's probation and remand to the district court to reconsider the probation-revocation issue in light of the illegality of the ten-year conditional-release term. Because we reverse the probation revocation on the basis of the change in Kellogg's sentence, we do not address Kellogg's other probation-revocation arguments.

Reversed and remanded.