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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1677**

State of Minnesota,
Respondent,

vs.

Cressdina Danika Bondeson,
Appellant.

**Filed June 24, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-16-4884

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

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Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Cressdina Bondeson pleaded guilty to and was convicted of fifth-degree
assault, fifth-degree possession of a controlled substance, and third-degree possession of a

controlled substance. The district court imposed three concurrent sentences but granted a downward dispositional departure, staying execution of those sentences and placing Bondeson on probation. Two years later, the district court revoked her probation and executed the sentences. Bondeson appeals from the revocation, arguing that the district court (1) abused its discretion by revoking her probation and (2) erred by sentencing her on both counts of controlled-substance possession and by miscalculating her criminal-history score. We affirm the district court's revocation, but we reverse and remand for resentencing.

FACTS

In July 2016, Bondeson was arrested following an incident in which she hit a tow-truck driver during a dispute over payment. During the booking process, police discovered that Bondeson was in possession of 5.8 grams of cocaine and 1.06 grams of methamphetamine. Bondeson was charged with fifth-degree assault, third-degree drug possession, and fifth-degree drug possession. She entered a straight plea of guilty to the charges and was convicted of each count. The district court sentenced her to 24 months' imprisonment on the assault, 61 months' imprisonment on the third-degree possession, and 28 months' imprisonment on the fifth-degree possession, staying execution of these sentences and placing Bondeson on probation for two years with respect to the fifth-degree offenses and ten years with respect to the third-degree possession. Among other conditions of probation, Bondeson was required to complete chemical-dependency treatment.

In December 2017, the Ramsey County Community Corrections Department filed a probation-violation report, alleging that Bondeson had been charged in several crimes

and had “failed to enter and complete a treatment program.” Bondeson turned herself in and was held in custody, but she denied the criminal allegations. She was eventually released pending resolution of the criminal charges, with the requirement that she enter a treatment program by May 4, 2018.

Bondeson did enter a treatment program but was discharged on May 8, 2018. A warrant was issued for her arrest. The court withdrew that warrant when, two days later, a bed at another treatment program became available and Bondeson entered that program. In early July, probation officers learned that Bondeson had been discharged from the second treatment program. She was then arrested for that alleged probation violation. On July 20, 2018, Bondeson appeared before the district court and admitted that she had failed to complete treatment, in violation of the terms of her probation. She offered no excuse for the failure. The district court revoked Bondeson’s probation and ordered execution of all three sentences, to be served concurrently.

D E C I S I O N

I. The district court did not abuse its discretion in revoking Bondeson’s probation.

A district court must make three findings before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). In particular, 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.* The fact of a violation must be proved by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c); *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008).

District courts have broad discretion to determine whether there is “sufficient evidence to revoke probation.” *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 249-50). We review the district court’s findings for an abuse of discretion. *Id.*

Bondeson argues that the district court abused its discretion in its identification of the condition or conditions of probation violated and by concluding that the policies favoring probation were outweighed by the need for confinement.

A. Specific conditions violated

As the state acknowledges, Bondeson admitted to and was found to have violated only one condition of probation—the requirement that she complete a treatment program. Bondeson argues that the district court erred in its findings by stating that the “*violations* [were] intentional, without cause, justification, or legal excuse” and that “not sending Ms. Bondeson to prison at this point would unduly depreciate the seriousness of all of the *violations*.” (Emphasis added.)

Assuming, without deciding, that Bondeson is correct and that the district court’s reference to “violations” refers to other conduct not found by clear and convincing evidence, Bondeson does not clearly explain why that fact entitles her to reversal. Only a single violation is required to satisfy the first *Austin* finding. *See Austin*, 295 N.W.2d at 250 (stating that the first finding the court must make is “the specific condition or conditions” the defendant violated). And there is no dispute that the district court correctly found Bondeson’s failure to complete treatment to be a violation. Thus, even if the district

court did erroneously refer to additional “violations,” that error is harmless as to the first *Austin* finding, which is indisputably satisfied.

B. Intent or lack of excuse

Any error in referring to other “violations” was equally harmless as to the second *Austin* finding. The court found “that the violations [were] intentional, without cause, justification, or legal excuse.” There is no dispute that Bondeson’s failure to complete a treatment program was intentional or inexcusable. *See id.* (defining the second required finding). Thus, even if the district court erroneously found other conduct to be intentional or inexcusable, that error is immaterial as to the second required finding because there is no dispute that it was properly made as to Bondeson’s failure to complete a treatment program.

C. The need for confinement versus the policies favoring probation

In evaluating the third required finding—whether the need for confinement outweighs the policies favoring probation—a district court should consider whether:

- (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.

Modtland, 695 N.W.2d at 607 (quotation omitted). When considering these three sub-factors of the third required finding, the district court may consider a variety of information. *Austin*, 295 N.W.2d at 251 (instructing district courts to consider “the original offense and

the intervening conduct of the offender” (quotation omitted)). The nature of the violations themselves and whether they are a single isolated incident or a significant violation are relevant considerations. *See State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (holding that several years of failure to maintain contact with probation justified revocation, but distinguishing a hypothetical single missed meeting with a probation officer), *review denied* (Minn. July 19, 2011).

Bondeson contends that the district court over-weighed the seriousness of her violation by including the criminal charges against her in its analysis even though it did not find that the charges had been proved by clear and convincing evidence and Bondeson did not admit to them. Her argument is unpersuasive. Our review of the record leads us to conclude that the district court’s findings on all three sub-factors are fully supported by Bondeson’s failure to complete necessary chemical-dependency treatment and her proven antisocial behavior when using drugs.

1. Need to protect the public from further criminal activity

The district court found that Bondeson is “a danger to the public when [she is] out on the street.” Bondeson contends that this finding was erroneous because, after her first failure to complete treatment, the probation officer recommended only 365 days in jail, but, after her second treatment failure, the probation officer recommended revocation. Bondeson argues that there was no difference between the two instances of failure to complete treatment and that the second failure therefore does not support the district court’s conclusion that there was a need to protect the public from future criminal activity.

The state, on the other hand, argues that the district court’s finding on the need to protect the public from Bondeson is supported not just by Bondeson’s failure to complete treatment but also by “the newly acquired criminal charges, which allege crimes of violence.” The only case the state cites to argue that this court may consider those unproved crimes is *State v. Bollin*, 670 N.W.2d 605, 607-08 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004), a case that relies on *State v. Hlavac*, 540 N.W.2d 551, 552-53 (Minn. App. 1995). *Bollin* purports to allow this court to “affirm a probation revocation if the factors are supported by sufficient evidence in the record.” 670 N.W.2d at 607-08. But the point of law *Bollin* relies on from *Hlavac* was expressly overruled in *Modtland*. 695 N.W.2d at 606 (“In the 25 years since *Austin*, our decision has been interpreted to allow for a ‘sufficient evidence exception’ to the requirement that courts make the requisite three findings. While this reading of *Austin* has taken hold in the lower courts, we do not believe such an interpretation can be reconciled with the language of *Austin* itself.” (citations omitted)). The unproved allegations of Bondeson’s new crimes cannot be considered as support for the third *Austin* finding.

Despite the failure of the state’s argument, the district court’s finding on the need to protect the public is nevertheless supported by the record. The court told Bondeson that prison “protects society from who you are when you’re . . . using and out there.” The original offenses—which Bondeson does not dispute can be considered—were committed while Bondeson was using drugs and involved drug possession. The fact that Bondeson failed twice, in short succession, to complete treatment suggests that treatment is unlikely to succeed if she remains on probation. The district court did not abuse its discretion by

concluding that Bondeson's repeated failure to complete treatment means that she is more likely to be a threat to the public if she is not confined.

2. Need for correctional treatment that will be most effectively provided by confinement

The district court also found that Bondeson was "in need of correctional treatment," noting that it would recommend "boot camp," a prison program aimed at rehabilitation. Bondeson argues that this finding was erroneous because there was no evidence that Bondeson would be eligible for boot camp or would be allowed to participate in chemical-dependency programming while in prison.

But Bondeson's repeated failures at treatment out of prison were sufficient to demonstrate to the district court that out-of-prison treatment will not succeed. Even if the district court could not be certain that Bondeson would be able to enter boot camp or otherwise receive treatment while in prison, it did not abuse its discretion by concluding that the possibility of in-prison treatment was a better option for "break[ing] her of this cycle" than further attempts at in-community treatment.

3. Undue depreciation of the seriousness of the violation

Finally, Bondeson argues that the district court's decision to revoke her stay was a "reflexive reaction" rather than a judgment that her conduct "demonstrates that . . . she cannot be counted on to avoid antisocial activity," citing *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (quotation omitted).¹ She argues that the district court was

¹ Although Bondeson cites federal caselaw for this proposition, her statement of the law is supported by both *Austin*, 295 N.W.2d at 251, and *Modtland*, 695 N.W.2d at 608. Thus, it is an accurate statement of the law in Minnesota.

reacting reflexively to her family history² and to her anger about her childhood, rather than considering whether it would depreciate the seriousness of the violation not to revoke probation.

However, the district court's comments do reflect concern for the seriousness of the violation. The court referred back to its original finding that Bondeson was amenable to probation, a finding that was supported by the court's conclusion that treatment for mental health and chemical dependency issues would be better in the community than in prison. But Bondeson's repeated failure to complete treatment in the community refuted that belief. Because the possibility of non-prison treatment was the reason for probation in the first place, the failure of that treatment is a serious probation violation that would be unduly depreciated if it was overlooked. Thus, the district court did not abuse its discretion in analyzing the third sub-factor.

In sum, the district court did not abuse its discretion by concluding that each of the findings required by *Austin* supported revocation of Bondeson's probation.

II. The district court erred in sentencing Bondeson.

The parties agree that the district court committed two errors in sentencing Bondeson: first, it sentenced her on both counts of controlled-substance possession even though they arose out of a single behavioral incident; and, second, it sentenced her assault conviction before it sentenced her possession conviction, even though the possession

² In the initial plea colloquy, it was revealed that Bondeson had pleaded guilty in front of the same judge in the past, and that the judge had represented Bondeson's mother at some point before becoming a judge.

occurred before the assault. A defendant may challenge a stayed sentence after probation is revoked and the sentence is executed. *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987).

A. Sentencing on both counts of controlled-substance possession

The district court sentenced Bondeson for both the third-degree controlled-substance crime and the fifth-degree controlled-substance crime. Those crimes were based on Bondeson's possession of 5.8 grams of cocaine and 1.06 grams of methamphetamine, respectively.

Multiple punishment is generally prohibited for crimes arising out of a single behavioral incident, subject to certain exceptions. Minn. Stat. § 609.035, subd. 1 (2014) (“[I]f a person’s conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses”); *State v. Bookwalter*, 541 N.W.2d 290, 293-94 (Minn. 1995) (using the phrase “single behavioral incident” to explain the rule of section 609.035). Whether crimes arise from a single behavioral incident is determined by whether the crimes occur “at substantially the same time and place and [are] motivated by a single criminal objective.” *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). “[P]ossession of two controlled substances at the same time and place, with no discernible criminal objective other than personal use, bars the imposition of separate sentences.” *State v. Reese*, 446 N.W.2d 173, 180 (Minn. App. 1989) (citing *State v. Zimmerman*, 352 N.W.2d 452, 455 (Minn. App. 1984)), *review denied* (Minn. Nov. 15, 1989).

The district court here correctly noted that the two possession charges arose out of the same behavioral incident: Bondeson possessed the substances at the same time and place, and there was no suggestion she had any objective other than personal use.

Nonetheless, the district court sentenced the convictions separately. This was error. Bondeson’s simultaneous possession of cocaine and methamphetamine was, as the district court found, a single behavioral incident, and multiple punishment was prohibited. *Id.* We therefore reverse Bondeson’s sentence for fifth-degree possession of a controlled substance and remand to the district court to correct the warrant of commitment to vacate that sentence.

B. Sentencing the fifth-degree assault offense before the possession offense

The district court sentenced Bondeson for the fifth-degree assault offense before sentencing her for the possession offense. When sentences for multiple crimes not arising from the same behavioral incident are imposed on the same day, convictions underlying earlier sentences are added to the defendant’s criminal-history score for subsequent sentences. *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). This is referred to as the “*Hernandez* method.” *See id.* “Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred.” Minn. Sent. Guidelines 2.B.1.e (2015). At sentencing, the state bears the burden of proving “that a prior conviction qualifies for inclusion within the criminal-history score.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018).

Here, there is no dispute that the fifth-degree assault and the possession offense did not arise from the same behavioral incident—the offenses were motivated by different criminal objectives, *see Jones*, 848 N.W.2d at 533—and were subject to separate sentences. The district court sentenced the assault first, and then applied the *Hernandez* method, increasing Bondeson’s criminal-history score when sentencing her for third-degree

possession of a controlled substance. But the state now concedes that Bondeson's possession offense occurred before her assault offense, and the record supports that chronology. Bondeson should have been sentenced first for the third-degree possession offense and second for the assault. We therefore reverse and remand for resentencing consistent with this opinion, with the limitation that the new sentence may not exceed the original sentence. *See State v. Prudhomme*, 228 N.W.2d 243, 246 (Minn. 1975) (holding that a district court, when resentencing a defendant, may not "increase the penalty for any of the offenses on which it will sentence defendant").

Affirmed in part, reversed in part, and remanded.