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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1746**

Samuel Wayne Behrens, Jr.,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 20, 2019
Affirmed
Kalitowski, Judge***

Benton County District Court
File No. 05-CR-13-594

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

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

Philip K. Miller, Benton County Attorney, Michael J.G. Schnider, Assistant County Attorney, Foley, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Kalitowski, Judge.

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from the summary denial of his petition for postconviction relief, appellant Samuel Wayne Behrens, Jr. argues that the postconviction court erred by concluding that the revocation of his probation and execution of his prison sentence was not an abuse of discretion. We affirm.

DECISION

This court reviews “a postconviction court’s summary denial of a petition for postconviction relief for an abuse of discretion.” *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). “A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record, or exercises its discretion in an arbitrary or capricious manner.” *Crow v. State*, 923 N.W.2d 2, 9, (Minn. 2019) (quotation omitted).

To revoke probation, a district court must identify the specific conditions of probation that were violated, find that those violations were “intentional or inexcusable,” and “find that need for confinement outweighs the policies favoring probation.” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). “[I]n making the three *Austin* findings, . . . [district] courts must seek to convey their substantive reasons for revocation and the evidence relied upon.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). Because revocation of probation is within the broad discretion of the district court, this court will not reverse absent a clear abuse of that discretion. *Austin*, 295 N.W.2d at 249-50.

Behrens challenges the third *Austin* factor, that the need for confinement outweighs the policies favoring probation. When analyzing this factor, a district court must consider that, while the facts may permit revocation, the purpose of probation is rehabilitation, and revocation should be a last resort. *Modtland*, 695 N.W.2d at 606. The need for confinement outweighs the policies favoring probation if at least one of the 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 (quotation omitted).

Here, Behrens pleaded guilty to second-degree criminal sexual conduct in May 2013, and received a stay of imposition, which included 25 years' probation. After Behrens's fifth probation violation,¹ the district court imposed a 36-month prison sentence in August 2016, but stayed execution of that sentence and ordered Behrens to serve 120 days in jail. A few months later, another probation violation report was filed alleging that Behrens had violated several terms of his probation. Following a contested probation-violation hearing on December 20, 2017,² the district court found that there was clear and convincing evidence that Behrens violated the conditions of his probation by: (1) using and

¹ Behrens's 2016 violation was dismissed.

² The district court initially revoked Behrens's probation and executed the previously stayed 36-month prison sentence after a contested probation-violation hearing on December 29, 2016. This court subsequently concluded that Behrens was denied his constitutional right to the effective assistance of counsel, and reversed the revocation and remanded for a new probation violation hearing. *State v. Behrens*, No. A17-0499, 2017 WL 4341816 at *3 (Minn. App. Oct. 2, 2017).

possessing alcohol; (2) accessing “the internet without permission from his agent”; (3) possessing six cell phones, “five of which were capable of internet access”; and (4) failing to “attend the intake for his outpatient treatment programming that was scheduled.”

Behrens does not dispute the district court’s determination that he violated the conditions of his probation. But Behrens argues that the need for confinement does not outweigh the policies favoring probation because his “violations were minor, technical violations.” For example, Behrens asserts that although he “admitted using alcohol,” there “was no evidence indicating that he had consumed alcohol to the point of being drunk.” And Behrens asserts that although he “may have accessed the internet, there was no indication that he was doing anything inappropriate while accessing the internet.” Behrens contends that because the violations were technical, it would [not] depreciate the seriousness of the violations if probation were not revoked. We disagree.

Behrens’s condition of probation was not that he refrain from getting drunk, it was that he refrain from consuming alcohol. Moreover, Behrens did not violate one condition of his probation, he violated four conditions. And in addition to the violations stemming from the December 2016 violations report, the record reflects that Behrens has violated conditions of his probation several times over the course of his probation, including: (1) failing to abstain from alcohol in 2013; (2) being terminated from sex-offender treatment in 2015; (3) failing to abstain from the internet and controlled substances in 2016; (4) failing to cooperate with probation in 2016; and (5) purchasing a phone capable of accessing the internet in 2016. The district court found:

[P]robation has done all it could to try to treat you and help you, but you didn't want to help yourself.

....

You were given multiple, multiple, multiple chances, probably more than anyone I've had before in court, and you have failed repeatedly with decisions that you've made, decision to access the internet, decisions to use chemicals, and decisions to thwart your probation.

Although it may have been helpful to have more particularized findings addressing the subfactors related to whether the need for confinement outweighs the policies favoring probation, the district court's findings sufficiently demonstrate that revocation of Behrens's probation was a last resort and that the need for confinement outweighs the policies favoring probation. Accordingly, we conclude that the summary denial of Behrens's petition for postconviction relief was not an abuse of discretion.

Affirmed.