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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1757**

State of Minnesota,
Respondent,

vs.

Shane Douglas Wellman,
Appellant.

**Filed July 1, 2019
Affirmed
Cochran, Judge**

Cottonwood County District Court
File No. 17-CR-16-80

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

Nicholas Anton Anderson, Cottonwood County Attorney, Windom, Minnesota (for
respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Chief Judge; Florey, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant Shane Douglas Wellman appeals the district court's decision to revoke
his probation, arguing that the evidence in the record does not show that the need for

confinement outweighs the policies favoring probation. Because the evidence in the record supports the district court's finding and the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

On February 26, 2016, Wellman made a threat to his father. At the time, he was on probation for a drug offense. Wellman was ultimately charged with and pleaded guilty to threats of violence under Minn. Stat. § 609.713, subd. 1 (2014). The Cottonwood County District Court stayed imposition of Wellman's sentence and placed him on probation for five years, pursuant to a plea negotiation.

On February 28, 2018, Wellman's probation agent filed a probation-violation report that alleged that Wellman was in violation of his probation conditions. Wellman moved out of a sober living house that his treatment program recommended and failed to notify the agent that he changed his address when he moved out. The agent noted in the report that she had called the sober house manager to ask that Wellman be tested for substance use, and the manager said that Wellman had moved out two months prior after refusing to take a drug test. The agent alleged that Wellman violated two probation conditions: the condition that he follow all recommendations of his treatment program, and the condition that he notify the probation agent of any address change. Wellman's whereabouts were unknown, and the district court issued a warrant for his arrest.

Wellman was eventually apprehended, and the district court conducted a contested probation-violation hearing on April 10, 2018. The district court found that the state failed to prove that Wellman did not follow all recommendations of his treatment program

because the treatment program did not expressly recommend or require that Wellman live at the sober house after completing treatment. The district court found, however, that Wellman did violate the condition that he notify his probation agent of any address change. The district court found that Wellman's violation was intentional and inexcusable, but it also found that the need for confinement did not outweigh the policies favoring probation. The district court reinstated probation, but told Wellman, "I am going to add some additional conditions that are very specific to you and the testimony that I have heard here today." The district court imposed conditions that required Wellman to notify his probation agent of his new address within 72 hours and that Wellman had to check in with his probation agent on a weekly basis. The district court said to Wellman:

[I]t's going to be very evident very quickly whether or not you are going to comply and be successful on probation or we will have you back here fairly soon.

This is your first violation and I'm giving you a bit of a break in this case, but you—you didn't test positive and you were homeless. So, those are factors that—that weigh in favor of giving you another chance.

....

All right. Well, there's another opportunity, but you are going to have to work at it and you are going to have to take charge of your own life. You've been kind of passive thus far. That doesn't bode well. You need to—you need to be an adult now and take charge of your life and we will see whether you can do that.

Approximately three months later, on July 12, 2018, the probation agent filed a second violation report that alleged that Wellman failed to contact his agent as directed. The agent noted on the report that Wellman had "not adjusted well to supervision" since

the prior violation. The agent indicated that she attempted to transfer Wellman's supervision from Cottonwood County to Olmsted County because Wellman had moved to the Rochester area, but Wellman failed to report to his appointments, did not respond to telephone contact from Olmsted County, and also did not respond to the agent's attempts to call and text him. The district court issued a warrant for Wellman's arrest.

Wellman was arrested pursuant to the warrant on or about July 28, 2018. Three days later, the district court held a bail hearing. It released Wellman from jail on the condition that he report to Olmsted County probation by August 1 and appear for a probation violation hearing on August 2. Wellman checked in with Olmstead County probation as directed.

Wellman appeared for the contested probation violation hearing. At the hearing, the state orally amended the violation report to include an allegation that Wellman violated the no-drug-use condition of his probation. The state had learned that Wellman tested positive for methamphetamine after he was arrested on July 28. The court received the test results at the hearing. Wellman's probation agent also testified that Wellman's father called 911 three times on July 31 as he and Wellman drove to Rochester after the bail hearing. The agent also testified that she learned from police that Wellman told the responding officers that he had used methamphetamine recently.

Wellman admitted that he failed to give probation his updated address and phone number. Despite the positive test result, he denied that he had used methamphetamine. He also denied telling the responding officers that he had used methamphetamine recently.

The district court found that Wellman violated two probation conditions: the no-drug-use condition and the condition that he maintain contact with his probation agent. It found that Wellman's violations were intentional and inexcusable and that the need for confinement outweighs the policies favoring probation.

In discussing the failure-to-maintain-contact violation, the district court stated:

[Wellman] was ordered to comply with probation and to contact his probation agent as directed. [Wellman] has failed to do that again. The court would find that this is the second time [Wellman] has been in court for a same or similar type of violation. The last time we were in court and this was brought up by [Wellman] the last time we were in court several months ago, [Wellman] was again accused of not keeping in contact with his probation and his whereabouts were unknown for two months. We are again back here for a same or similar violation. [Wellman] failed to report to Olmsted County to submit to probation and to cooperate with the transfer of his probation and failed to keep in contact with his probation agent.

And, in finding that the need for confinement outweighs the policies favoring probation, the district court explained:

In consideration of the history of this case, of the type of offenses and violations that [Wellman] has committed and the fact that he has essentially been unsupervised for the last several months for this felony offense, I do find that the need for confinement outweighs the policies favoring probation.

[Wellman] was given an opportunity to submit to probation at the beginning of this case and has demonstrated consistency in his unwillingness to keep in contact with probation or submit to probationary supervision.

I further find that the use of methamphetamine is a public safety risk. Again, confinement is necessary to protect the public from further activity—criminal activity by the offender and it would unduly depreciate the seriousness of the

violation in consideration of this entire case if probation were not revoked.

The district court revoked Wellman's stay of imposition, imposed the presumptive sentence of 21 months and executed the sentence.

Wellman appeals.

DECISION

Before revoking probation, a district court 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.” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Wellman does not challenge the district court's findings on the first two prongs: that he violated specific conditions of his probation and that the violations were intentional. Instead, Wellman argues on appeal that the evidence in the record does not support the district court's finding that the need for confinement outweighs the policies favoring probation. The district court has “broad discretion in determining if there is sufficient evidence to revoke probation.” *Id.* at 249. A reviewing court will reverse a district court's probation determination only “if there is a clear abuse of that discretion.” *Id.* at 249-50.

In determining whether the need for confinement outweighs the policies favoring probation, “district courts must bear in mind that policy considerations may require that probation not be revoked even though the facts may allow it and that the purpose of probation is rehabilitation.” *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quotation omitted). “[R]evocation should be used only as a last resort when treatment has

failed.” *Austin*, 295 N.W.2d at 250. “The decision to revoke 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.” *Id.* at 251 (quotations omitted). The district court must “balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety and base [its] decisions on sound judgment and not just [its] will.” *Modtland*, 695 N.W.2d at 607 (quotation omitted). The need for confinement outweighs the policies favoring probation if “(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.” *Id.* (quoting *Austin*, 295 N.W.2d at 251).

The district court expressly discussed the first and third sub-factors in finding that the need for confinement outweighs the policies favoring probation. It found that Wellman’s methamphetamine use posed a public safety risk and that confinement is necessary to protect the public from further criminal activity. It also found that it would unduly depreciate the seriousness of the violations if probation was not revoked. Moreover, the district court discussed several other factors that supported its conclusion that the need for confinement outweighs the policies favoring probation, notably, (1) the type of offenses and violations that Wellman had committed, (2) the fact that Wellman had in effect been unsupervised for several months while he was out of contact with his probation agent, and (3) the district court’s determination that Wellman “demonstrated

consistency in his unwillingness to keep in contact with probation or submit to probationary supervision.”

Wellman argues that the evidence does not support the district court’s finding because there is evidence that he successfully completed the Pathways inpatient treatment program in February 2017 and had only one positive drug test while on probation. He maintains that his methamphetamine use does not pose a threat to public safety. He asserts that he immediately remedied his failure to contact Olmsted County probation after he was released from jail at the bail hearing. Ultimately, he contends that he was largely successful on probation and that he is not a danger to public safety.

While it is true that Wellman was successful with some aspects of probation, he accumulated three probation violations within five months. As the district court noted, Wellman’s repeated violations show that he is unwilling or unable to comply with the conditions of his probation. Wellman did not make contact with Olmsted County until after he was arrested on the probation violation warrant. And, he tested positive for methamphetamine in violation of his probation after he was arrested for violating another provision of his probation. In this context, the repeated violations support the district court’s conclusion that it would unduly depreciate the seriousness of the violations if probation was not revoked. And, with regard to Wellman’s drug use violation, this court has recognized that a district court could properly consider that an offender’s “continued [drug] use and involvement with controlled substances is a danger to the public interest” that supports a finding that the need for confinement outweighs the policies favoring probation. *State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff’d on other grounds*,

721 N.W.2d 886 (Minn. 2006) (affirming the district court’s decision to revoke probation, in part, because the defendant’s continued use and involvement with controlled substances posed a danger to the public interest, but the defendant’s drug use also was a contributing factor to defendant’s underlying conviction). Consequently, we conclude that the evidence in the record supports the district court’s finding that the need for confinement outweighs the policies favoring probation.

Moreover, the district court’s decision to revoke Wellman’s probation was consistent with the Minnesota Sentencing Guidelines. The guidelines provide that revocation of a stayed sentence is justified when “the offender continues to violate conditions of the stay despite the court’s use of expanded and more onerous conditions.” Minn. Sent. Guidelines 3.B (Supp. 2017). After Wellman’s first probation violation hearing, the district court imposed more onerous conditions related to Wellman’s failure to notify his agent of his address change. Despite the use of expanded conditions, Wellman violated probation again in a similar manner just three months later.

The district court acted within its discretion when it found that the need for confinement outweighs the policies favoring probation. The district court made sufficient findings, supported by the evidence, to sustain the revocation. We conclude that the district court’s decision was not a “reflexive reaction” proscribed by *Austin*, and affirm the district court’s decision to revoke Wellman’s probation. 295 N.W.2d at 251 (quotation omitted).

Affirmed.