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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2056**

State of Minnesota,
Respondent,

vs.

Drey Lamar Lee,
Appellant.

**Filed June 17, 2019
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-17-2364

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's order revoking his probation for first-degree criminal sexual conduct after he left the State of Minnesota for the second time in violation of probation and pleaded guilty to a new felony-level offense. Because the district court did not abuse its discretion by not giving appellant a third opportunity on probation, we affirm.

FACTS

On April 4, 2017, respondent State of Minnesota charged appellant Drey Lamar Lee with two counts of first-degree criminal sexual conduct and one count of kidnapping, alleging that Lee approached a woman at a bus stop in St. Paul, pulled her into a vehicle, and sexually assaulted her at gunpoint. Lee pleaded guilty to one count of first-degree criminal sexual conduct pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970),¹ in exchange for the state's agreement to dismiss the remaining counts and to recommend that Lee receive a probationary sentence. The district court accepted Lee's guilty plea.

On October 23, 2017, Lee appeared for sentencing and asked the district court to follow the plea agreement and place him on probation. The district court expressed concerns about the plea agreement, stating,

¹ A defendant "may plead guilty to an offense, even though the defendant maintains his or her innocence, if the defendant reasonably believes, and the record establishes, the state has sufficient evidence to obtain a conviction." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (citing *Alford*, 400 U.S. at 37, 91 S. Ct. at 167).

Well, Mr. Lee, I'm very concerned about . . . placing you on probation. I've had concerns throughout your case, both that you're not going to be able to complete the treatment that I'm going to order, and now I have real concerns that you may violate the law. I want to be very clear with you, and I am going to order treatment and order that you follow the law, and I expect that you comply with those rules.

The district court's concerns were based on a psychosexual examination that Lee had completed and the examiner's conclusion that Lee is "a danger to the public, especially to vulnerable adult women."

After an off-the-record discussion between the attorneys and the district court, the state and Lee asked the district court to honor the plea agreement. Despite its concerns, the district court sentenced Lee in accordance with the plea agreement, staying a 144-month prison term for 30 years and imposing multiple conditions of probation.

On March 8, 2018, Lee's probation officer filed a probation-violation report, alleging that Lee had violated the conditions of probation by leaving the state without prior approval and by failing to keep his probation officer informed of his current address. Lee admitted the violations. The district court ordered Lee to serve 90 days in jail as a sanction for his admitted probation violations and continued him on probation.

On June 4, 2018, Lee's probation officer filed a second probation-violation report, alleging that Lee had once again violated the conditions of probation by leaving the state without prior approval, by failing to report his arrest in Wisconsin for disorderly conduct and criminal damage to property, and by having contact with a minor. The state orally amended the report to allege that Lee violated probation by failing to remain law-abiding based on Lee's May 2018 guilty plea to a felony-level offense of failure to register as a

predatory offender. Lee admitted the violations, and the district court set a date for a disposition hearing.

At the disposition hearing, a licensed social worker testified on Lee's behalf. She informed the district court that she had researched sex-offender programming that might be available to Lee in the community. One such program, Project Pathfinder, worked with clients who deny their offenses. Based on her review of Lee's medical records, the social worker informed the district court that Lee "functions in the borderline intellectual functioning range," had a brain tumor removed in 2006, and subsequently suffered from seizures. Lee is also hearing impaired.

The social worker testified that she was "concerned that due to all of [Lee's] medical, mental health and cognitive issues," he would be "extremely vulnerable" in prison and would have difficulty participating in programming there. For example, she testified that while Lee was in jail for his first probation violation, he did not receive his seizure medication because he could not hear announcements indicating that medications were being dispensed. The social worker described several services that could benefit Lee if he were to remain in the community. She testified that she believed Lee was capable of fulfilling the requirements of his probation, with some assistance for his "constellation of impairments and challenges."

Lee submitted a copy of his probation officer's notes and a report from the La Crosse County Human Services Department regarding his out-of-state residence and contact with a minor. The state did not present any evidence or testimony. Lee's probation officer addressed the district court, noting that during the first probation-violation hearing earlier

that year, after Lee had violated his probation by leaving the state without prior approval, the district court warned Lee “on numerous occasions” not to do so again. Because Lee had violated probation a second time by leaving the state without approval, committed new crimes, and had contact with a minor, the probation officer concluded that Lee was “not amenable to probation” and recommended execution of Lee’s stayed sentence. The state argued for execution of the sentence, citing Lee’s repeated violations and the fact that he had been living with a vulnerable adult and a minor, both of which violated conditions of his probation. The state argued that “community supervision [was] not working” and that “the need for confinement . . . outweigh[ed] the policies favoring probation in order to protect the public.”

Lee characterized his actions, other than his recent felony predatory-offender-registration conviction, as “technical violations,” emphasized his medical and mental-health issues, and argued that the probation department had not adequately worked to provide him with necessary services. Lee asked the district court to continue his probation because he was “in dire need of services that can happen on a community level.”

The district court found that Lee had violated specific conditions of probation and that the violations were intentional or inexcusable. The district court also found that the need for Lee’s confinement outweighed the policies favoring probation. The district court revoked Lee’s probation and executed his 144-month sentence. Lee appeals.

D E C I S I O N

The district court has “broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion.”

State v. Austin, 295 N.W.2d 246, 249-50 (Minn. 1980). “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 (quotation omitted).

Before a district court may revoke a defendant’s probation, 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.* at 250. In assessing the third *Austin* factor, the district court should consider whether “confinement is necessary to protect the public from further criminal activity by the offender,” whether “the offender is in need of correctional treatment which can most effectively be provided if he is confined,” and whether “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 251 (quotation omitted).

Lee challenges the district court’s third *Austin* finding, arguing that “[t]he need for confinement did not outweigh the policies favoring probation.” Lee argues that “[i]t was error to conclude that [he] failed to avail himself [of] services never offered to him as the basis to revoke his probation” and that the district court’s decision to revoke “undermine[d] the policies favoring probation because it weighed more-heavily the repetitious nature of [his] technical violations by impermissibly crossing an invisible line,” the state line, “over the availability of programming in the community.”

As to the third *Austin* factor, the district court reasoned that it had “deep concerns about the probationary services that Mr. Lee received,” noting that although the

psychosexual examination found that Lee was at a high risk to re-offend and recommended long-term treatment in a secure setting, Lee had yet to enter treatment. But the district court noted that probation had difficulty providing the recommended services in part because Lee had twice left the state in violation of his probation. The district court also noted that after Lee's first violation for leaving the state, he was told not to leave the state again because he could not receive services if he did. Nonetheless, Lee left the state a second time.

Moreover, Lee was charged with and convicted of a felony offense for failing to register as a predatory offender. He was also charged with two misdemeanor offenses. The district court understandably concluded that confinement was necessary to protect the public from further criminal activity by Lee, that Lee could more effectively be provided with treatment if confined, and that Lee's violations were serious, and not "technical," because he not only left the state without approval but also "set up residence in another state after being told not to, thus making himself unavailable for probationary services, which he so desperately needs."

The district court's reasoning is sound. The district court's decision to revoke Lee's probation was not a reflexive reaction to a technical violation. It was a well-reasoned decision resulting from Lee's repeated failure to remain in the State of Minnesota where he could be supervised and receive probationary services.

Lee complains that the probation department did not do enough to set up services on his behalf in Minnesota. But as the district court noted, it was difficult for probation to provide services to Lee when he left the state twice and "set up residence" in another state

the second time, without notifying probation. The district court was not required to give Lee a third opportunity to comply with probation. On this record, the district court did not abuse its discretion by revoking Lee's probation.

Affirmed.