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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0086**

State of Minnesota,
Respondent,

vs.

Terry Kenneth Armstrong,
Appellant.

**Filed July 22, 2019
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Stearns County District Court
File No. 73-CR-17-1816

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Slieter, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

SLIETER, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion in determining that his conduct was intentional and inexcusable, and that the need for confinement outweighed the policies favoring probation. He also argues that the district court erred in sentencing him to 128 months' imprisonment, when his guilty plea contained an agreement to a 98-month cap. We affirm in part, reverse in part, and remand.

FACTS

On December 6, 2016, law enforcement observed appellant Terry Kenneth Armstrong sell methamphetamine to a confidential informant. After the sale, appellant drove away, and officers followed him in three marked police vehicles. Appellant entered I-94, and officers activated the lights on the three police vehicles as they followed him. Officers then activated their sirens. The traffic on the highway was heavy and the road was snowy, but appellant continued to accelerate and did not make any effort to stop. In light of the road conditions, officers cancelled the pursuit to protect public safety.

On February 28, 2017, the state charged appellant with fleeing a police officer, in violation of Minn. Stat. § 609.487, subd. 3 (2016). The state later amended the complaint to add a count 2 for first-degree sale of a controlled substance, in violation of Minn. Stat. § 152.021, subd. 1(1) (2016). Appellant pleaded guilty to count 2, and the state dismissed count 1. The parties agreed to a "98-month cap" on the sentence with the understanding that appellant would argue for a downward dispositional departure. The district court

accepted appellant's plea. On June 14, 2018, the district court held a sentencing hearing. The district court granted appellant's motion for a downward dispositional departure, stayed execution of a 128-month prison sentence, and placed him on probation for 30 years. Conditions of his probation included successfully completing treatment at Restoration Counseling and Community Services (RCCS) and abstaining from the use of all mood-altering chemicals.

In October 2018, appellant's probation officer filed a violation report. It stated that appellant had committed two probation violations: (1) failing to complete treatment programs at RCCS and Park Avenue Treatment, and (2) failing to abstain from illegal drugs or alcohol. On October 24, 2018, the district court held a contested probation revocation hearing. Appellant admitted to the violations. Appellant admitted to struggling during treatment and ultimately relapsing. He explained that he was coping with the death of his brother, and that he was doing everything he could to stay sober.

The district court found that the "violation was intentional or inexcusable in terms of the last prong, the need for confinement outweighing the policies favoring probation." The district court explained that "[m]y biggest concerns are . . . all the criminal activity that was going on before your brother died and the positive UAs before your brother died." The district court understood that the death of a family member might "send anybody into a spiral," but that once appellant got the dispositional departure at sentencing, he "went back to the same behavior." The district court thus sentenced appellant to 128 months' imprisonment. This appeal follows.

DECISION

I. The district court did not abuse its discretion in revoking appellant's probation.

The district court has broad discretion in determining whether sufficient evidence exists to revoke probation, and we will reverse only if there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980).

When revoking probation, a district court must: (1) specify the conduct or conditions that the probationer violated, (2) find the violation was intentional or inexcusable, and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* at 250. The district court's decision to revoke probation "cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he . . . cannot be counted on to avoid anti-social activity." *Id.* at 251 (quotations omitted).

The supreme court has reaffirmed these holdings and language from *Austin*. *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005). It went on to explain that the three-step analysis in *Austin* "assures that district court judges will create thorough, fact-specific records setting forth their reasons for revoking probation[]" and that district "courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608.

Appellant challenges the district court's findings on the second and third *Austin* factors. We analyze each in turn.

A. Appellant's violations were intentional and inexcusable.

Appellant argues that his failure to complete aftercare treatment at a sober house was excusable because he was dealing with a 30-year chemical addiction, and then suddenly lost his brother. However, as the district court noted, appellant was using drugs *before* his brother passed away. Appellant's brother died in early October 2018, but appellant started displaying problems complying with probation much earlier. On June 19, 2018, just five days after his sentencing, his probation officer received a notice that he was breaking rules at RCCS. On July 25, 2018, appellant submitted a UA that was positive for methamphetamine. He provided another positive UA on August 28, 2018. Appellant completed in-patient treatment at RCCS in July, but left aftercare at the Park Avenue Treatment program in October; he was discharged "as AWOL."

There is nothing in the record to suggest that the district court abused its discretion in finding that appellant intentionally and inexcusably violated the terms of his probation. Appellant intentionally used drugs and admitted that no one forced him to do so. While the traumatic event of losing his brother could provide some excuse for his behavior, appellant acknowledged submitting positive UAs before that occurred. The district court did not abuse its discretion in finding that appellant's behavior was intentional and inexcusable.

B. The need for confinement outweighed the policies favoring probation.

Appellant further argues that the policies favoring probation outweighed any need for confinement because, while he struggled with relapses, he had successfully completed one treatment program, and "[e]ach time he fell, he took the initiative to get back on track."

When analyzing this third factor, a district court must consider that 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 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.

The district court found that all three subfactors were met. The district court focused on the addendum to the violation report, stating that “[m]y biggest concerns are the addendum report where it’s talking about[] . . . all the criminal activity that was going on before your brother died and the positive UAs before your brother died.” The addendum report specifically noted that appellant had three incidents from August to October 2018, where he had contact with law enforcement and failed to notify his probation officer. Appellant contends that these allegations were unproven, and based on “some unknown hearsay source.” However, at the revocation hearing, appellant admitted that at least one of these incidents occurred, he had contact with law enforcement and failed to notify his probation officer. He explained that he didn’t think it was a “big deal” because the officers let him go, and did not understand that he was required to report the incident.

Appellant further argues that the district court erred in relying on the addendum because “the court did not give [appellant] a chance to admit, deny, explain, or contest the

allegations. . . . If the court was going to use these allegations to support revocation, then it had to give [appellant] a chance to contest them.” However, this argument ignores the fact that appellant admitted to the probation violations. The only contested issue at the revocation hearing was the state’s recommendations that his sentence be executed. This court has explained that, once a probationer admits to the violations and waives the first part of a revocation hearing, “the state is no longer obliged to present evidence to prove the violations, and the district court may base its finding on the violation report and the probationer’s waiver, which serves as a stipulation to the state’s allegations in the violation report.” *State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). As in *Xiong*, appellant admitted to the violations, leaving the district court able to rely on the violation report. *Id.*

The record confirms that appellant consistently had difficulty during probation managing his addiction and staying out of trouble with law enforcement. While appellant demonstrated a commitment to treatment by completing a rule 25 exam to get back into a program, he has also acknowledged that his using drugs would lead him to sell drugs, a significant public safety issue. The record supports the conclusion that confinement was necessary to protect the public from further criminal activity, that appellant is in need of treatment which can most effectively be achieved through confinement, and that if probation was not revoked, it would depreciate the seriousness of the violations. Therefore, the district court did not abuse its discretion in finding that the need for confinement outweighed the policies favoring probation. The district court’s decision to revoke appellant’s probation is therefore affirmed.

II. The district court erred in sentencing appellant to 128 months' imprisonment, when the plea agreement capped the sentence at 98 months.

Appellant argues that the district court violated his plea agreement when it sentenced him to 128 months' imprisonment, since he had agreed to plead guilty with a 98-month cap. Respondent concedes this point and agrees that the case should be remanded to the district court to address the error.¹

Interpretation and enforcement of plea agreements are issues of law, which we review *de novo*. *Kubrom v. State*, 863 N.W.2d 88, 95 (Minn. App. 2015). “When a waiver of rights and plea were induced by the promise of a maximum sentence that the district court agreed to honor by its acceptance of the plea, due process requires that the promise be fulfilled.” *Id.* at 94 (quotation omitted). Appellant agreed to plead guilty with the understanding that there would be a 98-month cap on his sentence. By accepting this plea, the district court acknowledged this promise, and it therefore erred by not sentencing appellant in conformance with the agreed-upon cap. We therefore reverse and remand.

On remand, the district court must allow appellant to withdraw his guilty plea. See *State v. DeZeler*, 247 N.W.2d 231, 234 (Minn. 1988) (holding that, “if the trial court rejects an agreement as to sentence, the defendant is entitled to withdraw his plea.”). By sentencing appellant to 128 months' imprisonment, instead of the agreed 98 months, it rejected appellant's “plea of guilty on the terms of the plea agreement,” but did not properly

¹ However, even if the parties agree on an issue, it is the responsibility of appellate courts to decide cases in accordance with law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

“advise the parties in open court” or “call upon [appellant] to either affirm or withdraw his plea” pursuant to Minn. R. Crim. P. 15.04, subd. 3(1).

Affirmed in part, reversed in part, and remanded.