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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0096**

State of Minnesota,
Respondent,

vs.

Nicholas Ivan Dahl,
Appellant.

**Filed October 7, 2019
Affirmed
Jesson, Judge**

Lake of the Woods County District Court
File No. 39-K9-03-000090

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

James Austad, Lake of the Woods County Attorney, Baudette, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and
Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Appellant Nicholas Ivan Dahl pleaded guilty to one count of first-degree driving while intoxicated (DWI) pursuant to a plea agreement. In accordance with the plea agreement, Dahl received a stayed sentence and seven years of probation. After multiple

violations, the district court revoked Dahl's probation. Dahl appeals, challenging the revocation and his sentence. Because the district court made adequate findings supporting the revocation of Dahl's probation and because Dahl has not demonstrated that his criminal-history score is incorrect, we affirm.

FACTS

In 2003, the state charged appellant Nicholas Ivan Dahl with three offenses stemming from driving while intoxicated. Dahl missed his scheduled trial date, and a warrant was issued for his arrest.

Dahl remained on warrant status until August 2015 when he turned himself in to authorities. Pursuant to a plea agreement, Dahl pleaded guilty to first-degree driving while intoxicated in exchange for dismissal of the other two charges and a downward dispositional departure to probation and participation in substance abuse treatment court. At the plea hearing, the state explained that the parties were unsure of Dahl's criminal-history score, and that his presentence investigation was "probably gonna have a lot of leg work due to the unique circumstances of his case." The presentence investigation report indicated that Dahl's criminal-history score was five, resulting in a presumptive sentence duration of 66 months. Three of Dahl's five criminal-history points resulted from three burglary convictions from 1995. All three burglaries occurred on the same day.

The district court sentenced Dahl to 66 months in prison, but stayed the execution of the sentence. Dahl was placed on supervised probation for seven years and ordered to complete the Borderland Substance Abuse Court Program. At sentencing, Dahl did not

object to the calculation of his criminal-history score or his 66-month prison sentence. And the district court did not issue any findings regarding the three burglary convictions.

Over the next few years, Dahl violated his probation six times. His probation violations generally stemmed from his inability to remain law abiding and abstain from using alcohol and controlled substances. Although the district court imposed different penalties for each violation, it reinstated Dahl on probation each time.

In July 2018, police arrested Dahl for his seventh probation violation. The state alleged that an officer saw Dahl under the influence of alcohol and attempted to arrest him. Dahl resisted and refused to submit to a breath test or provide a urine sample. At a probation revocation hearing, Dahl admitted that he used alcohol and failed to submit to a urinalysis in violation of his probation. Dahl requested that the district court allow him to enter a chemical-dependency program. But the state requested execution of Dahl's 66-month sentence. Because the parties disagreed, the matter was scheduled for a contested hearing.

At that hearing, the state argued that Dahl had exhausted community resources but still continued to use intoxicants and should be committed to prison. Dahl's probation agent stated that she did not support Dahl continuing on probation. And the state asserted that Dahl could complete treatment while incarcerated. But Dahl argued that he should be permitted to remain on probation, contending that he had never been given the opportunity to complete a long-term treatment program, and that he would benefit from such a program.

The district court revoked Dahl's probation. In its written order, the district court found that, despite several opportunities on probation, Dahl continued to incur violations

that were both intentional and inexcusable. Further, the district court determined Dahl was not amenable to supervision and that, because Dahl continued to abuse intoxicants despite extensive chemical-dependency programming in the community, the need for confinement outweighed the policies favoring probation. Accordingly, the district court executed Dahl's 66-month sentence. Dahl appeals.

D E C I S I O N

Dahl raises two arguments in this appeal. First, Dahl challenges the district court's decision to revoke his probation, arguing he was amenable to treatment in the community because he had been accepted into his first long-term inpatient treatment program. Second, Dahl contends that the district court erroneously included criminal-history points for each of his three 1995 burglary convictions. We review each argument in turn.

I. The district court did not abuse its discretion when it revoked Dahl's probation.

The district court has broad discretion in deciding 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 "condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that [the] need for confinement outweighs the policies favoring probation." *Id.* at 250. Collectively, these three factors are known as the *Austin* factors. And whether the district court made adequate *Austin* findings is a question of law, subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Dahl challenges only the third *Austin* factor: that the need for confinement outweighs the policies favoring probation. In making this determination, the district court should consider whether (1) confinement is necessary to protect the public from further criminal activity, (2) the offender needs correctional treatment that can most effectively be provided in prison, or (3) reinstating probation would unduly depreciate the seriousness of the violation. *Id.*

Here, in carefully constructed and well-reasoned written findings, the district court determined that the need for confinement outweighs the policies favoring continued probation because Dahl exhausted the resources available to him and is not amenable to supervision in the community. In explaining its rationale, the district court stated:

Despite extensive programming for chemical dependency issues in the community, and approximately two (2) years in Borderland Substance Abuse Treatment Court, [Dahl] continues to not comply with the conditions of his treatment programs and fails to maintain sobriety. Furthermore, [Dahl] has had repeated probation violations for the same conduct. In a chemical dependency treatment evaluation in April 2018, he refused to acknowledge that he has a problem with alcohol and abusing over the counter medication. He further reported to the evaluator that he had been sober since January 2015 despite repeated use violations. He was found to not be amenable to further treatment at that time. Now that he is facing execution of his sentence, he is arguing for a long term treatment program. The [c]ourt finds that a long term treatment would benefit him but in a custodial setting as public safety requires the same.

The record supports this determination. Despite participating in many treatment programs—including outpatient, inpatient, and relapse prevention programs—and receiving the support provided by the drug court program, Dahl continued to use alcohol

and mood-altering substances in violation of the conditions of probation. He failed drug tests and admitted to abusing cough medicine to the point of psychosis. And the district court concluded that a treatment program in a custodial setting would benefit Dahl. Each of these findings indicate the district court's proper consideration of the third *Austin* factor and lead us to conclude that the district court did not abuse its discretion by revoking Dahl's probation.

Still, Dahl contends that he does not need correctional treatment, noting that the "purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Austin*, 295 N.W.2d at 250. According to Dahl, he should have been given an opportunity to complete the long-term inpatient treatment program to which he was accepted. But Dahl has been given the opportunity to complete numerous treatment programs. And the record indicates that despite these opportunities, Dahl continued to abuse alcohol and mood-altering substances. Based on these facts, the district court did not abuse its discretion by determining that Dahl would be better served by completing treatment while incarcerated.

In sum, the district court fully analyzed all three *Austin* factors, including the standards used to determine whether the need for confinement outweighs the policies favoring remaining on probation. And the record supports the district court's findings. Therefore, we conclude that the district court did not abuse its discretion by revoking Dahl's probation.

II. Dahl has not demonstrated that his criminal-history score is incorrect.

Dahl also challenges his sentence, arguing that it is based on an incorrect criminal-history score. According to Dahl, at sentencing, the state did not prove by a preponderance of the evidence that his three burglary convictions from 1995 arose from separate behavioral incidents. Although Dahl did not object to the calculation of his criminal-history score at trial, the supreme court has concluded that a criminal defendant cannot forfeit or waive review of his criminal-history score calculation.¹ *State v. Maurstad*, 733 N.W.2d 141, 147-48 (Minn. 2007). “[W]e will not reverse the district court’s determination of a defendant’s criminal history score absent an abuse of discretion.” *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

A defendant’s criminal-history score includes points for prior felony convictions. *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). At sentencing, the state bears the burden “to show that a prior conviction qualifies for inclusion within the criminal-history score” and that the criminal-history score is calculated correctly. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). But, when a defendant files a motion to correct an illegal sentence under rule 27.03, subdivision 9, of the Minnesota Rules of Criminal Procedure after the time for

¹ The state did not file a brief in this appeal. As such, the state did not argue that Dahl’s challenge to his sentence is not appropriately before us as part of a probation-revocation appeal based on *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987). We therefore do not reject Dahl’s challenge to his sentence on that basis, though we note that our reading of *Fields* suggests that Dahl should have presented his sentencing challenge to the district court at the probation-revocation hearing. See 416 N.W.2d at 735.

a direct appeal has passed, the *defendant* bears the burden of proving that his criminal-history score is incorrect. *Id.* at 743.

Similarly, in the context of this probation-revocation appeal, it is Dahl's burden to prove his criminal-history score is incorrect. *Id.* In *Williams*, the supreme court reasoned that a defendant bears the burden of proof in a collateral attack under the postconviction statute, making it logical that a defendant also bear the burden of proof when challenging a sentence based on an incorrect criminal-history score through a motion under rule 27.03, subdivision 9. *See id.* at 742 (stating that "we can ascertain no reason to have a different burden of proof apply based only on how a challenge to a sentence was captioned"). Likewise, we conclude that because Dahl would bear the burden to prove his criminal-history score is incorrect if he challenged his sentence through other mechanisms, he bears that same burden of proof when challenging his criminal-history score as part of his probation-revocation appeal.²

Based on the record before us, Dahl has not met his burden of demonstrating that his criminal-history score is incorrect. Although Dahl alleges that his three burglary convictions may have stemmed from a single behavioral incident, there is nothing in the record to support this assertion. Dahl has not provided any documentation demonstrating the circumstances surrounding his roughly 24-year-old convictions. And because Dahl did not raise his challenge to the district court, we do not have his testimony or any district

² Dahl's argument regarding his criminal-history score focuses on the state's alleged failure to prove Dahl's criminal-history score at sentencing. But these arguments are not persuasive because we conclude that in this appeal, it is Dahl's burden to demonstrate that his criminal-history score is incorrect.

court findings to review. Accordingly, because Dahl has only presented us with unsupported assertions, we conclude that Dahl has not met his burden of demonstrating that his criminal-history score is incorrect. As such, we affirm Dahl's sentence.

Affirmed.