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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0479**

State of Minnesota,
Respondent,

vs.

Tom Jr. Trass,
Appellant.

**Filed December 9, 2019
Reversed and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-16-30723

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and Kalitowski, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Pursuant to an agreement with the state in a probation-revocation proceeding based on a new criminal charge, appellant Tom Trass demanded execution of his sentence in exchange for dismissal of the new charge. Consistent with this agreement, the district court executed Trass's sentence although Trass had fewer than nine months to serve in prison.

Trass now appeals, arguing that the district court erred by honoring his request to execute his sentence because Minn. Stat. § 609.135, subd. 7 (2016), prohibits it. In the alternative, Trass argues that honoring his execution demand was prohibited because his probation was not more onerous than prison. He also argues that the district court erred by denying his request for substitute counsel. Because we conclude that Minn. Stat. § 609.135, subd. 7, prohibited the district court from honoring Trass's execution demand, we reverse and remand to the district court for further probation-revocation proceedings.

FACTS

In January 2017, Trass was convicted, upon his guilty plea, of violating a domestic-abuse no-contact order (DANCO) pursuant to Minn. Stat. 629.75, subd. 2(d)(1) (2016). The district court sentenced Trass to 21 months' imprisonment, stayed execution of the sentence, and placed him on probation for three years. His conditions of probation included serving 90 days in jail, with eligibility for electronic home monitoring after 30 days; abiding by a probationary DANCO and having no contact with the victim, C.H.; maintaining contact with his probation officer; remaining law abiding; and following other standard terms and conditions of probation.

On October 1, 2018, the state charged Trass with a new DANCO violation, alleging that Trass had been in contact with C.H. Probation filed a corresponding notice of violation in the first case, alleging that that Trass had violated his probation conditions by failing to remain law-abiding and by contacting C.H. The two cases tracked together before the district court. At Trass's first appearance for the new charge, the district court set bail on that matter but ordered that Trass be held without bail on the probation-violation matter.¹

At an omnibus hearing on October 31, 2018, Trass entered a speedy-trial demand in the new case and denied the probation violation in the first case. Trial for the new case was set for December 31, 2018. No additional proceedings were scheduled for the probation-violation matter at that time.

The state later moved to continue the December 31 trial, and the parties appeared before the district court on December 19, 2018 to address the continuance motion. Over Trass's objection, the district court found good cause to continue the trial outside the speedy-demand period and rescheduled the trial for February 19, 2019. The district court offered, however, to schedule a contested probation-violation hearing (also known as a "*Morrissey* hearing," see *Morrissey v. Brewer*, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602 (1972)) on Trass's first DANCO case for the following week. Trass, through his counsel, agreed to this arrangement, and the *Morrissey* hearing was scheduled for December 27, 2018. The district court informed Trass that the standard of proof at the *Morrissey* hearing would be clear and convincing evidence, not proof beyond a reasonable doubt.

¹ The alleged violation would be Trass's third probation violation in this case.

When the parties appeared on December 27 for the *Morrissey* hearing, Trass immediately stated that he would not participate in the hearing and that he had “fired” his public defender. Trass asserted that he did not know that the hearing was happening and that his public defender had scheduled it without his “full knowledge.” Trass and the district court then discussed Trass’s concerns about his public defender in more detail, and Trass eventually agreed to speak with his public defender privately before making a decision about how to proceed.

After speaking with his public defender, Trass informed the district court he would continue with the public defender as his attorney. Trass then waived his right to a *Morrissey* hearing and demanded execution of his sentence in the first DANCO case. In exchange for Trass’s execution demand, the state had agreed to dismiss the new DANCO charge. The district court followed the agreement of the parties and executed the sentence in the first DANCO case. Trass’s probation agent informed the court that Trass had 163 days of custody credit to be applied to that sentence. Neither party objected to this number, and the district court awarded Trass 163 days of custody credit. This meant that Trass would serve about 8 months and 21 days in prison and be released September 16, 2019, absent disciplinary infractions.

On March 25, 2019, Trass appealed to this court from the district court’s order executing his sentence.

DECISION

Trass argues that the district court erred by honoring his request to execute his sentence because Minn. Stat. § 609.135, subd. 7, prohibits his execution demand.

Alternatively, he argues that his execution demand was prohibited because his probation was not more onerous than prison. Trass also argues that the district court erred by denying his request for substitute counsel at the December 27, 2018 hearing. He argues that any one of these three alleged errors is a basis for reversal of the order executing his sentence and remand for a probation-violation hearing. We begin with whether Minn. Stat. § 609.135, subd. 7, prohibits Trass’s execution demand.

Whether the district court made the findings required for the revocation of probation is a question of law, which appellate courts review *de novo*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Trass’s argument primarily turns on the interpretation of Minn. Stat. § 609.135, subd. 7, and statutory interpretation is also a question of law reviewed *de novo*. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

When sentencing a criminal defendant, a district court may stay execution of a prison sentence and place the defendant on probation. Minn. Stat. § 609.135, subd. 1(a)(2) (2016). Generally, if a defendant is accused of violating the terms of probation, a district court needs to “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” before it may order execution of the stayed sentence. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980).

In 1982, though, the Minnesota Supreme Court held that a defendant with a stayed sentence has the right to demand execution of that sentence “if the conditions of probation make probation more onerous than prison.” *State v. Randolph*, 316 N.W.2d 508, 510 (Minn. 1982). In doing so, the court reasoned that,

[w]hile a defendant may prefer to go to prison, society also has an interest that may well include a period of incarceration of the defendant followed by the threat of prison as a means of encouraging a defendant to accept treatment, make restitution, change his lifestyle or other desirable ends.

Id.

In 1989, the legislature limited the execution-demand right announced in *Randolph* as follows: “An offender may not demand execution of sentence in lieu of a stay of imposition or execution of sentence if the offender will serve less than nine months at the state institution.” Minn. Stat. § 609.135, subd. 7; *see also State v. Parson*, 457 N.W.2d 261, 264 n.6 (Minn. App. 1990) (explaining that “[t]he supreme court established the right of a criminal defendant to demand execution of a sentence” but “[t]he legislature eliminated this right when an offender would serve less than nine months in a state institution”), *review denied* (Minn. July 31, 1990). In *State v. Samarzia*, 452 N.W.2d 727 (Minn. App. 1990), *review denied* (Minn. Apr. 25, 1990), the appellant-defendant argued that he still had an “absolute” right to demand execution of his sentence under *Randolph*. This court disagreed, holding that Minn. Stat. § 609.135, subd. 7, negated his right and prevented him from demanding execution because he would only serve approximately eight months and one week in prison. *Samarzia*, 452 N.W.2d at 728.

Trass and the state agree that, pursuant to Minn. Stat. § 609.135, subd. 7, Trass had no right to demand execution of his sentence if he would serve less than nine months in prison. Trass asserts that, at the time he made his execution demand, he would serve only

8 months and 21 days on his executed sentence, after accounting for good time² and custody credit.³ The state acknowledges that the district court awarded Trass 163 days of custody credit and that, if this number is correct, Trass would serve less than nine months' imprisonment.

The state argues, however, that the record is “unclear” as to how much custody credit Trass was entitled to on his sentence when he demanded its execution. The state asserts that, from a review of “Minnesota Government Access,” Trass may have been entitled to only 134 days of credit. If this is true, Trass would have had over nine months' imprisonment to serve, so the statute would not bar his execution demand.

Because the state did not raise the issue of the proper amount of custody credit in the district court, and because it does not support its argument with evidence in the record, we decline to consider this argument. An appellate court “generally will not decide issues that were not raised before the district court.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). And “[t]he record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any.” Minn. R. Crim. P. 28.02, subd. 8. The record before this court is clear as to Trass's custody credit; the alleged

² An executed felony sentence presumptively consists of imprisonment for two-thirds of the sentence followed by supervised release for the remaining third, absent disciplinary infractions. Minn. Stat. § 244.101, subd. 1 (2016); *see also Carrillo v. Fabian*, 701 N.W.2d 763, 772 (Minn. 2005) (“[U]nder Minnesota's current sentencing scheme, there is a presumption . . . that the inmate will be released from prison on a certain date—and that presumption is overcome only if the inmate commits a disciplinary offense.”).

³ Defendants are entitled to have their term of imprisonment reduced by the number of days “spent in custody in connection with the offense or behavioral incident.” Minn. R. Crim. P. 27.03, subd. 4(B).

ambiguity was not raised before the district court and comes only from a source outside the record.

Based on the record before this court, Trass had 163 days of custody credit when he demanded execution of his sentence. The parties agree that, if this number is correct, Trass had less than nine months to serve in a correctional facility. The plain language of Minn. Stat. § 609.135, subd. 7, prohibits a defendant from “demand[ing] execution of sentence in lieu of a stay of imposition or execution of sentence if the offender will serve less than nine months at the state institution.” Thus, the district court was without authority to order execution of Trass’s sentence based solely on Trass’s execution demand. In order to permissibly execute his sentence, the district court needed to follow the process and make the findings outlined in *Austin*, 295 N.W.2d at 250. We accordingly reverse the order executing the sentence and remand for further probation-violation proceedings.

Because we conclude that Minn. Stat. § 609.135, subd. 7, prohibits Trass’s execution demand, we need not reach Trass’s other two arguments for reversal of the district court’s order and remand to the district court.

Reversed and remanded.