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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1713**

State of Minnesota,
Respondent,

vs.

Corey Rashad Culberson,
Appellant.

**Filed May 26, 2020
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-15-6985

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

UNPUBLISHED OPINION

JESSON, Judge

Appellant Corey Rashad Culberson pleaded guilty to third-degree criminal sexual conduct after police discovered him having sexual contact with a 15-year-old girl. While

on probation, Culberson participated in multiple sex-offender-treatment programs, but each program discharged him based on his behavior. Following his third probation violation, the district court revoked his probation and ordered execution of his sentence. Culberson challenges this revocation, arguing that the record does not support the district court's findings. Because there is ample evidence in the record to support the district court's decision to revoke Culberson's probation, we affirm.

FACTS

In March 2015, police discovered appellant Corey Rashad Culberson having sexual contact with a 15-year-old girl in his car, parked in a graveyard. Both he and the victim admitted to the police that they had sexual intercourse. The state charged Culberson, then age 35, with third-degree criminal sexual conduct.

Culberson pleaded guilty. He submitted to a presentence psychosexual evaluation and a presentence investigation. After reviewing these reports, the district court sentenced Culberson pursuant to the plea agreement: a three-year stay of imposition, 180 days in jail with work release, and other conditions including no contact with the victim and completion of a sex-offender-treatment program.

Nearly three years later, probation filed a violation report alleging that Culberson had failed to complete sex-offender treatment. Specifically, Culberson had been discharged from two different programs: outpatient treatment with Alpha Human Services (Alpha) and Turning Leaf individual therapy. And his discharges from the programs were due to insufficient progress and excessive absences and tardiness. At the violation hearing, Culberson admitted that he failed to complete the two treatment programs. The district

court extended his probation term by three years and ordered him to serve 120 days in the workhouse, but permitted his furlough to Alpha's residential treatment program.

Almost four months later, probation filed a second report alleging two new violations. First, that Culberson failed to complete treatment because he had been suspended from Alpha. In the report, the probation officer described how Culberson had been doing poorly in treatment, including making rude and disrespectful comments about women and girls, telling stories that disrupted group sessions, being antagonistic with his female therapist, and forging staff initials on a document for another client. The report also alleged that Culberson was having contact with his victim (now 18), that she had moved in with him several months prior, and that the two were having an ongoing sexual relationship. At the second hearing, Culberson admitted to the violations, and the district court ordered him to serve 90 days in jail.

About six months after his second violation, probation filed a third violation report, alleging that Culberson again failed to complete sex-offender treatment after being discharged from Alpha. The report described how Culberson was "returning to old behaviors" in treatment and making only marginal progress. Staff at Alpha intercepted a note drafted by Culberson comparing the breasts of a female therapist with those of another woman. After that incident, Culberson continued to interfere with staff and other clients, which affected their therapeutic progress, and he had "not advanced beyond the most preliminary phase" of treatment. The state submitted the discharge summary from Alpha to the court for consideration and requested revocation of Culberson's probation.

At the violation hearing, Culberson again admitted to the violation. The district court found that his violation was intentional and inexcusable. And it found that confinement was necessary to prevent future criminal conduct and that treatment could only be effectively delivered in confinement. After argument from the parties as to disposition, the district court revoked Culberson's probation and ordered him to serve 36 months in prison. Culberson appeals.

DECISION

Culberson argues that the district court abused its discretion by revoking his probation. District courts have broad discretion to determine whether there is sufficient evidence to revoke probation, and we will not reverse unless the court clearly abused that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). And we review findings of fact for clear error. *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008).

When deciding whether to revoke probation, the Minnesota Supreme Court has adopted a three-step framework that district courts must follow. *Austin*, 295 N.W.2d at 250. The three *Austin* factors require a district court 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.” *Id.* Culberson admitted to violating his probation, and he does not contest the first *Austin* factor in this appeal. Rather, he challenges the district court's determinations on factors two and three. We review each finding in turn.

Intentional or Inexcusable

After designating the specific probation condition that was violated, district courts must find that the probationer's violation was "intentional or inexcusable." *Id.* Here, the district court's conclusion that Culberson's violation was intentional or inexcusable is supported by the record. Culberson did not put forth the effort necessary to complete treatment, or even progress past the "preliminary phase" after six months of programming at Alpha. He attempted treatment a total of three times—including in outpatient, individual, and residential settings—and was discharged based on his poor behavior, which persisted each time he restarted treatment. Alpha provided him several opportunities to complete treatment, but he failed to do so each time. His final discharge was due to his repeated unwillingness to change his poor behavior, interference with therapy, failure to take treatment seriously, and ongoing disrespect to staff and other clients.

The district court also gave Culberson several chances to complete treatment. When he violated probation the two previous times, the court declined to revoke probation. And after the second violation, at a review hearing, the court warned Culberson that he "need[ed] to succeed" and "pull it together" because he was "holding on by a thread," and still in the treatment program "but it sounds like barely." Despite this warning, Culberson continued to not make progress in treatment and was discharged from the program a few months later. Culberson's failure to cooperate with treatment and make progress in the program was intentional and inexcusable. The district court's finding on this factor is amply supported by the record.

Yet, Culberson advances three arguments as to why the district court's conclusion that his failure to complete treatment was intentional and inexcusable was erroneous. First, according to Culberson, his failure to complete treatment was not intentional because he was still participating in treatment. But the requirement was that Culberson *complete* treatment, not merely attend and participate. And this court has previously affirmed the revocation of probation based on a probationer's failure to complete his required treatment program. See *State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming revocation when the probationer was not accepted into two treatment programs and consequently failed to complete sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation when the probationer was discharged from one treatment program and not accepted into another). More to the point, at the time of the revocation hearing, it does not appear that Culberson was participating in any treatment program.

Second, Culberson contends that he may have been more successful in other community-based programs. He suggests that he did not get along with his therapist at Alpha and that this contributed to his struggle to make progress. But Culberson's probation officer noted that he had five different therapists throughout his various treatment attempts and had difficult relationships with all of them, which suggests that the difficulty rested with Culberson and not the providers.

Finally, Culberson asserts that he had no control over Alpha discharging him, meaning that his failure to complete its program was not intentional. But Culberson's behavior is what caused Alpha to discharge him, as is made clear from the court's findings,

which are supported by the record. Overall, the district court's conclusion that Culberson's failure to complete treatment was intentional and inexcusable is supported by the record.

Comparing the Need for Confinement with the Policies Favoring Probation

Next, we turn to the third factor, in which the district court must find that the "need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d. at 250. In doing so, "courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quotations omitted). The supreme court outlined three subfactors a court should consider in this analysis.

Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

- (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 (quotation omitted). The district court found that the first and second subfactors above were met here. These findings are supported by the record.

With regard to the first subfactor, Culberson's confinement was necessary to protect the public. In his psychosexual evaluation, Culberson was considered a moderate to high risk to reoffend. And the Alpha discharge summary concluded that, based on assessments of Culberson's psychological, interpersonal, and sexual functioning, he was at a high risk

to reoffend at the time of his discharge. These reports indicate that the public would likely be at risk if Culberson were not confined.

Turning to the second subfactor, the record demonstrates that Culberson was in need of treatment that could be most effectively provided while he is confined. It is well documented that Culberson failed to complete community-based treatment multiple times, even in increasingly more restrictive settings. He struggled with absences and tardiness in outpatient settings, and he struggled with appropriate behaviors and compliance when programming was delivered in a residential setting. Alpha's discharge summary opined that Culberson acted like he was "above therapeutic involvement" and viewed "treatment as if it were a joke." The record supports the district court's finding that Culberson failed to succeed in treatment outside of confinement, inviting its conclusion that the most effective way to provide treatment here was through confinement.¹

Still, Culberson challenges the district court's findings under this factor on three grounds. First, according to Culberson, an intermediate sanction would have been more appropriate. While it is true that revocation is generally a last resort, *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007), the district court only revoked probation after Culberson's *third* violation. And the supreme court has held that it is reasonable to conclude that treatment has failed when a probationer has "been offered treatment but has

¹ Culberson also addressed the last subfactor, about depreciating the seriousness of the violation, in his brief. But the district court made no findings on this subfactor, and the subfactors are separated by "or" so findings about two of the three subfactors are sufficient to sustain the revocation. See *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000) (concluding that "or" is generally disjunctive).

failed to take advantage of the opportunity or to show a commitment to rehabilitation.”
Austin, 295 N.W.2d at 251.

Second, Culberson contends that confinement was not necessary to protect the public because he committed no new offenses while he was on probation. But he cites no authority for the assertion that he must have committed a crime for the district court to determine that his confinement was necessary to protect public safety. *See State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (affirming probation revocation despite the appellant’s assertion that he committed no new crimes while on probation), *review denied* (Minn. July 19, 2011). And the record indicates that Culberson is at a moderate to high risk of reoffending, further underscoring the risk to the public if he remained in the community untreated.

Finally, according to Culberson, while the district court found that treatment could be most effectively delivered while he was confined, there was no proof in the record that treatment was available in prison. But Culberson fails to provide legal support for his assertion that there must be proof in the record that specialized treatment in prison is certain to sustain a district court’s finding. And his repeated failures to complete treatment while out of prison sufficiently demonstrate that treatment in the community would not succeed. Even if the district court were unsure whether treatment would be available to Culberson in prison, it did not abuse its discretion by concluding that in-prison treatment would be more effective when out-of-prison treatment had failed.

In sum, Culberson admitted to violating his probation by failing to complete a sex-offender-treatment program. The district court did not abuse its broad discretion by

finding that this violation was intentional and inexcusable and that the need for his confinement outweighed the policies favoring probation. And the court's findings are supported by the record. Accordingly, we affirm.

Affirmed.