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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2036**

State of Minnesota,
Respondent,

vs.

Jesse Daniel Kriesel,
Appellant.

**Filed August 10, 2020
Affirmed
Bratvold, Judge**

Morrison County District Court
File No. 49-CR-17-326

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

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for
appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and
Halbrooks, Judge.*

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

UNPUBLISHED OPINION

BRATVOLD, Judge

In this appeal from the district court's order revoking probation and executing a stayed sentence, appellant argues that the district court (1) violated his due-process rights by excluding his witnesses at his probation-revocation hearing and (2) abused its discretion by revoking probation and executing his sentence. We affirm.

FACTS

In February 2013, when he was 16 years old, appellant Jesse Daniel Kriesel pleaded guilty to one count of being an ineligible person in possession of a firearm. The district court designated Kriesel as an extended jurisdiction juvenile (EJJ).¹ Kriesel pleaded guilty and the district court imposed a stayed 60-month sentence, adjudicated him delinquent, and placed him on probation.

In February 2017, four days before Kriesel's 21st birthday, the district court revoked Kriesel's EJJ status because he had violated terms of his probation. The revocation effectively terminated the extended jurisdiction of the juvenile court and jurisdiction transferred to adult court. *See* Minn. Stat. § 260B.130, subd. 5(a), (c)-(d) (2018). The district court dispositionally departed and reimposed the 60-month prison sentence, stayed execution of the sentence, and again placed Kriesel on probation. The district court reasoned that Kriesel had developed "a serious chemical dependency" for which he had

¹ EJJ is a status for "a child who has been given a stayed adult criminal sentence, a disposition under [Minn. Stat. § 260B.198], and for whom jurisdiction of the juvenile court may continue until the child's twenty-first (21st) birthday." Minn. R. Juv. Delinq. P. 19.01, subd. 2(A).

not yet received treatment, so there was no “disadvantage to staying execution and requiring [Kriesel] to go to treatment.” The district court also stated that the possibility of an executed prison sentence was no longer “going to deter [Kriesel] or scare [him] off” and that Kriesel’s family, not the threat of serving prison time, was “[t]he reason to get sober.” The district court imposed several conditions of probation, including that Kriesel was required to abstain from using drugs and alcohol, submit to drug testing on demand, and remain in contact with his probation officer. The district court repeatedly warned Kriesel throughout the hearing that this was a “one-time shot” and his “last opportunity,” and that violating the terms of probation would result in the execution of his 60-month prison sentence.

In August 2019, Kriesel’s probation officer recommended that the district court revoke probation because Kriesel had violated three terms of probation. The probation officer’s report stated that Kriesel registered a 0.061 alcohol concentration in a preliminary breath test on June 13, 2019, failed to appear for drug testing on three occasions in July 2019, and failed to keep in contact with the probation officer after July 30, 2019.

The district court held a probation-revocation hearing. Kriesel admitted to the probation violations at the start of the hearing. The state called Kriesel’s probation officer, who testified about the probation violations. Kriesel testified about the circumstances leading up to the violations. After Kriesel testified, the district court asked if he had “[a]ny other witnesses.” Kriesel’s attorney said that he intended to call two additional witnesses to testify. The district court did not allow either witness to testify because, after hearing the attorney’s offer of proof, the court found the testimony “not relevant.”

The district court revoked Kriesel's probation, executed the stayed sentence, and committed Kriesel to the commissioner of corrections for 60 months with credit for time served. Kriesel appeals.²

DECISION

I. The district court did not violate Kriesel's due-process rights by excluding his witness testimony at the revocation hearing.

Kriesel argues that the order revoking probation should be reversed because the district court "violated [his] due process rights by refusing to allow [him] to present his witnesses at his probation revocation hearing." He contends that his witnesses "could have not only corroborated [his] testimony and reasons for his relapse, they also had independent information about [his] treatment success and sobriety."

The United States and Minnesota Constitutions guarantee criminal defendants due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. The right to due process applies in probation-revocation proceedings. *See Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2603-04 (1972) (holding that the right to due process applies to parole-revocation proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60 (1973) (extending *Morrissey* to probation-revocation proceedings); *see also Pearson v. State*, 241 N.W.2d 490, 492-93 (Minn. 1976) (applying the holdings of *Morrissey* and *Gagnon* to probation-revocation proceedings in Minnesota).

² The state informed this court that it would not submit a responsive brief in this appeal. This court therefore conducts its review under Minn. R. Civ. App. P. 142.03 (providing that default of respondent results in merits review).

Due process guarantees several constitutional safeguards before probation can be revoked. One safeguard is the “opportunity to be heard in person and to present witnesses and documentary evidence.” *Id.* at 492 (quoting *Morrissey*, 408 U.S. at 489, 92 S. Ct. at 2604); *see also* Minn. R. Crim. P. 27.04, subd. 2(1)(c)d (requiring district court to inform probationer of the right to “call and cross-examine witnesses” at the first appearance in revocation proceedings). “Whether a defendant has been denied due process of law is a question of law that [appellate courts] review de novo.” *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015).

At the revocation hearing, Kriesel testified that he had been diagnosed with depression and severe anxiety, stopped taking his prescription medications because he lost his health insurance, had trouble staying employed, and had personal issues that caused his relapse into drug and alcohol use.

In response to the district court’s question about additional evidence, Kriesel’s attorney stated that two witnesses, Kriesel’s sister and his long-term girlfriend, would “testify about the difference between when [Kriesel]’s sober and when he’s not,” that they were “not willing to put up with anything but what is best which includes sobriety,” and that they are “part of his support network.” The district court rejected the attorney’s offer of proof as “not relevant.” Kriesel elaborates on appeal that his witnesses would have provided “mitigating evidence as to why the violations should not result in revocation” and “independent information about [his] treatment success and sobriety.”

Morrissey, *Gagnon*, and *Pearson* provide that a probationer has the right to an *opportunity* to present witnesses at a revocation hearing. Kriesel had that opportunity. After

he testified, there were no disputed facts so additional testimony was unnecessary. Based on the offer of proof, the excluded testimony was cumulative of Kriesel's already-admitted testimony. We acknowledge that the Minnesota Rules of Evidence do not apply to revocation proceedings, *see* Minn. R. Evid. 1101(b)(3), and therefore do not refer to these rules with regard to the district court's decision to exclude Kriesel's witnesses. We note, however, that Kriesel provides no legal authority holding that a due-process violation occurs when a district court excludes cumulative evidence from a revocation hearing.

Based on our review of this record, we conclude that the district court's decision to exclude Kriesel's proffered witness testimony was not a due-process violation.³

II. The district court did not clearly abuse its discretion by revoking probation and executing Kriesel's sentence.

Kriesel argues that the district court abused its discretion by revoking probation and imposing an executed sentence. A district court's decision to revoke probation and execute a sentence "cannot be a reflexive reaction to an accumulation of technical violations," but instead "requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *State v. Austin*, 295 N.W.2d 246, 251 (Minn. 1980) (quotation omitted). "The [district] court has broad discretion in determining if there

³ Even if we assume the district court erred, our standard for reversal is unclear. The most stringent standard for reversal requires the error to be harmless beyond a reasonable doubt. *See State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012). We conclude that any error is harmless beyond a reasonable doubt because there were no factual disputes concerning Kriesel's probation violations and Kriesel's witnesses would have provided—at most—cumulative evidence.

is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion.” *Id.* at 249-50.

A district court may revoke probation upon finding clear and convincing evidence of a probation violation. Minn. R. Crim. P. 27.04, subds. 2(1), 3(2)-(3). Before revoking probation, a district court’s findings must satisfy three factors: (1) specifically designate the conditions of probation 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.” *Austin*, 295 N.W.2d at 250. These are commonly called the *Austin* factors.

In district court and again on appeal, Kriesel challenges only the third *Austin* factor. When considering the third *Austin* factor, district courts should limit revoking probation to situations where one of three sub-factors are present:

(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.

State v. Cottew, 746 N.W.2d 632, 636 (Minn. 2008) (quoting *Austin*, 295 N.W.2d at 251).

Only one sub-factor is necessary to support revocation. *See id.*

The district court found that the first sub-factor weighed against revocation because it did “not believe” confinement was necessary to protect the public. The district court found that the second sub-factor weighed against revocation because it was “not necessarily the case” that Kriesel needed treatment that could most effectively be provided in confinement.

But on the third sub-factor, the district court found that *not* revoking probation would unduly depreciate the seriousness of the probation violations, stating:

My understanding is [the judge presiding over the EJJ revocation proceeding] made a decision to dispositionally depart when he did sentence you as an adult. He believed at that time that you were amenable to probation and afforded you a chance.

Now I understand the chemical dependency. I understand relapse. I understand support systems. I understand all of that. But what's inexcusable here is you completely having no contact with your probation agency and not testing for that month.

....

And then your own admission here that you were using meth which is something that should have triggered something for you to reach out and you didn't. That's what scares me. . . . [W]hat you did is you went back to use. That's not amenable to probation.

So in light of that, the *Austin* factors do apply, and I am going to commit you.

Kriesel contends that the district court erred, reasoning that “the need for confinement was not outweighed by the policies favoring probation [because he] had a relapse after he successfully completed inpatient and aftercare treatment, was doing well on probation for a significant period[,] and had been moved to a lower level of supervision.” In other words, Kriesel relies on the first two sub-factors.

We discern no clear abuse of discretion in the district court's decision to revoke probation based on the third sub-factor. After testing positive for alcohol in June 2019, Kriesel falsely told a police officer that he did not know he could not drink alcohol while

he was on probation. Kriesel then violated another term of probation by failing to appear for drug testing on three occasions in July 2019. Kriesel's probation officer testified that Kriesel did not appear for the first two tests because he could not afford them, but that does not explain Kriesel's third failure to appear because his probation officer allowed him to pay for the test at a later date. Then, after failing to appear for drug testing for the third time, Kriesel ceased all contact with his probation officer—a violation the district court found "inexcusable." The district court's reasons for revoking probation are supported by the record.

We reject Kriesel's argument that revocation was a "reflexive reaction" to a series of "technical violations." First, Kriesel had many opportunities over several years to show his amenability to probation. And the district court warned that he had one "last opportunity" to succeed on probation after his EJJ status was revoked in 2017. Second, Kriesel's violations were more than "technical." In 2017, the district court placed Kriesel on probation so that he could get treatment for chemical-dependency issues. Therefore, Kriesel's drug and alcohol use undermined one of the primary purposes of his probation. Third, Kriesel's contention that his violations were "technical" conflicts with the district court's finding that his failure to remain in contact with probation was "inexcusable." As the district court explained, Kriesel admitted he began using drugs while he remained out of contact with probation, and this "is something that should have triggered something for you to reach out and you didn't." Refusing to be supervised defeats the possibility of successful probation.

In sum, we conclude that the district court did not clearly abuse its discretion by revoking probation and executing Kriesel's stayed sentence.

Affirmed.