

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1155**

State of Minnesota,
Respondent,

vs.

L. P. K.,
Appellant.

**Filed April 5, 2021
Affirmed
Florey, Judge**

Scott County District Court
File Nos. 70-JV-17-9918; 70-CR-20-7555

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

Ronald B. Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Laura G. Heinrich, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey,
Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant L.P.K. appeals from an order revoking his extended juvenile jurisdiction (EJJ) status and executing the stayed adult sentence. Because clear and convincing evidence supports the district court's exercise of discretion, we affirm.

FACTS

Appellant was charged with two counts of second-degree criminal sexual conduct after his younger sister told their parents that he had sexually assaulted her over a three-year period from February 2014 to March 2017. Because of his age, 16 years old, and the nature of the charges, appellant presumptively would have been charged as an adult, but the state agreed not to seek adult certification and to place appellant on EJJ status if he pleaded guilty to one count of second-degree criminal sexual conduct. In November 2017, the district court adjudicated appellant delinquent, imposed a guidelines sentence of 90 months, and stayed the sentence under EJJ. The district court added a number of conditions, including: (1) having no contact with minor females; (2) completing a psychosexual evaluation and cooperating with any recommendations; (3) engaging in no assaultive behavior; (4) having limited access to the internet and social media; and (5) remaining law abiding.

In February 2019, the county corrections department recommended that probation be revoked, alleging that appellant failed to remain law-abiding because he had a new third-degree criminal-sexual-conduct charge, had unsupervised contact with minor females, used social media to contact a minor female, and used the internet, all in violation of his EJJ conditions.

In November 2019, appellant submitted the issue of guilt on the new charge to the district court on stipulated facts. The district court found appellant guilty in December 2019. In June 2020, the district court held a hearing to sentence appellant on the new

charge, revoke his EJJ status, and execute the stayed adult sentence. Appellant was represented by counsel throughout both matters.

At this hearing, the district court asked counsel if he had advised appellant that the new conviction could result in revocation of his EJJ status, to which counsel replied in the affirmative. Next, the district court asked appellant if he understood he could have “a full-blown hearing” on the EJJ violation, at which he would be represented by counsel; the state “would have to prove by clear and convincing evidence that [appellant] violated the terms of [his] probation;” the state would call witnesses who would be subject to cross-examination; he could subpoena witnesses and submit documents and evidence; he could choose to testify or opt not to testify, and this choice would not be held against him. Appellant acknowledged that he had failed to remain law-abiding by being charged and convicted of third-degree criminal sexual conduct and that he had enough time to consult with his attorney.

Appellant hesitated when asked if he admitted or denied being in violation of his EJJ probation, but the district court explained that he failed to remain law-abiding by being convicted of a new charge. Again, with some hesitation, he admitted that meant he was in violation of the EJJ probation and stated that he had no questions about the new charge. He admitted he knew that remaining law-abiding was a condition of probation. The district court then inquired of counsel whether appellant understood his rights to a full EJJ hearing, to which counsel replied, “Yes, Your Honor.” Based on the guilty finding on the new charge and appellant’s admissions at this hearing, the district court revoked appellant’s EJJ

status and executed the 90-month sentence. In response to the state's request for findings to support the revocation, the district court stated:

I do find that [appellant's] actions were both intentional and/or inexcusable. I've had [him] on EJJ status since about 2014 with a number of different violations. Given the fact that he's been convicted of a new sex offense, I do find that confinement outweighs any and all probation at this time. And I also do so for public safety.

The district court confirmed these findings in a written order issued on June 25, 2020. This appeal, as well as a separate appeal of the new conviction, follow.

DECISION

I. Application of the *Austin* factors to EJJ revocation

We will reverse the district court's probation-revocation decision for an abuse of discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). But this court reviews the adequacy of the district court's *Austin* findings as a question of law subject to de novo review. *Id.*; see *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). Appellant argues that the district court failed to make the requisite finding supported by clear and convincing evidence that the need for confinement outweighs the policies favoring probation, as required by *Austin*.

In *Austin*, the Minnesota Supreme Court outlined the analysis a district court must make before revoking probation. *Id.* at 250. First, the district court must designate the specific conditions violated; next, the district court must determine if the violation was intentional or inexcusable; and, finally, the district court must weigh whether the need for confinement outweighs policies favoring probation. *Id.* These determinations, which also

apply to revocation of EJJ status, must be supported by clear and convincing evidence. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1), (2).

When deciding whether the need for confinement outweighs the policies supporting probation, such as rehabilitation, a court must balance the probationer's interest in freedom against the state's interest in rehabilitation and public safety. *Modtland*, 695 N.W.2d at 606-07. Typically, to support confinement, a court must find "on the basis of the original offense and the intervening conduct" that it is necessary to confine the probationer for reasons of public safety, treatment is more readily available in confinement, or the seriousness of the violation would be unduly depreciated if probation was not revoked. *Id.* at 607 (quotation omitted).

Here, the district court found that (1) appellant was adjudicated delinquent of second-degree criminal sexual conduct; (2) he was charged with and found guilty of third-degree criminal sexual conduct in violation of the condition to remain law-abiding; and (3) confinement was necessary because appellant committed a second sexual offense while on EJJ status, which "demonstrate[d] a serious threat to public safety" and indicated that he "ha[d] not rehabilitated under EJJ status." The district court concluded that "[p]ublic safety require[s] further supervision and confinement." These findings are supported by clear and convincing evidence and are adequate to sustain the district court's revocation of appellant's EJJ status.

II. Waiver of contested revocation hearing

Under Minn. R. Juv. Delinq. P. 19.11, subd. 2(A), an EJJ probationer facing revocation of his status must be informed of his rights to counsel; to a revocation hearing,

unless waived; to clear and convincing evidence of a violation; to disclosure of evidence; to subpoena and cross-examine witnesses; to presentation of mitigating evidence; and to appeal. Appellant contends that although the district court explained the various rights he had under Rule 19.11, he never personally waived his right to a hearing on the record.

An EJJ probationer may waive the right to a contested hearing. Minn. R. Juv. Delinq. P. 19.11, subd. 2(A)(2). The validity of a waiver is generally a question of law. *See State v. Williams*, 664 N.W.2d 432, 434 (Minn. App. 2003), *review denied* (Minn. Sep. 24, 2003). The right to a contested hearing under Rule 19.11 is similar to the right to a contested hearing under Minn. R. Crim. P. 27.04, governing probation revocation. Under each rule, a probationer is afforded certain rights as specified in *Morrissey v. Brewer*, 408 U.S. 471, 486-88, 92 S. Ct. 2593, 2603-04 (1972), and as extended to probation revocation by *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83, 93 S. Ct. 1756, 1759-60 (1973). But in contrast to the requirement under Minn. R. Crim. P. 26.01, subd. 1(2)(a), governing waiver of a jury trial, the rules governing probation and EJJ revocation do not specify that a probationer must personally waive the right to a contested hearing on the record. *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (regarding probation revocation).

The district court here advised appellant of his rights under Rule 19.11 and appellant acknowledged that he understood those rights and made no objection to proceeding without a contested hearing. Appellant had been represented by counsel throughout the EJJ proceeding and subsequent revocation. *See Hernandez v. State*, 408 N.W.2d 623, 626 (Minn. App. 1987) (assuming that defendant had been adequately informed of rights when he had a full opportunity to consult with counsel). He acknowledged that he had adequate

time to consult with his attorney, and the attorney assured the district court that appellant understood his right to a hearing. Under these circumstances, appellant's personal waiver of a contested revocation was not required.

III. Effect of appeal of companion case

Appellant argues that his conviction of third-degree criminal sexual conduct cannot be used as a basis for revocation of his EJJ status because he has appealed the district court's guilty finding on the new charge. He notes that the district court did not ask about the facts of the new charge and used only the fact of conviction as a basis for revoking the EJJ status for failure to remain law-abiding. Appellant cites no authority for preemptively reversing the EJJ revocation on these grounds.

Moreover, appellant admitted that he had failed to remain law-abiding. EJJ status may be revoked on the probationer's admission that he has violated provisions of the disposition order. Minn. R. Juv. Delinq. 19.11, subd. 3(C)(1); *see also* Minn. Stat. § 609.14, subd. 1 (providing that probation revocation can be premised on violation of stay conditions; subd. 3 (permitting district court to impose previously stayed sentence on finding of a violation of probation conditions).

Affirmed.