

*This opinion is nonprecedential except as provided by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
A21-1131**

State of Minnesota,
Respondent,

vs.

Brent Robert Stern,
Appellant.

**Filed April 25, 2022
Affirmed
Connolly, Judge**

Cottonwood County District Court
File No. 17-CR-13-211

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

Nicholas A. Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik L. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that the district court abused its discretion by revoking his probation and executing his stayed sentence for second-degree controlled-substance crime because the state did not prove that appellant violated a condition of his probation by failing

to complete treatment and the record does not support the finding that the need for appellant's confinement outweighs the need for his probation. Because we see no abuse of discretion in the revocation of appellant's probation, we affirm.¹

FACTS

Following his conviction of second-degree controlled-substance crime, appellant Brent Stern was sentenced to 129 months in prison. The execution of that sentence was stayed, and he was placed on probation. This was a dispositional departure: appellant's presumed sentence was commitment due to his "extensive criminal history and extensive criminal felony history." Conditions of his probation included abstaining from the use of all mood-altering chemicals and completing the recommendations of a chemical-use assessment.

Probation-violation hearings were held in February and March of 2016; appellant was convicted of another felony offense in January 2017; a sanctions conference was held in February 2018; another probation violation hearing was held in December 2019, at which appellant was ordered to comply with and complete a drug court program.

At a probation violation hearing in August 2020, appellant told the drug court judge that his sweat patch, a device that tests drug abuse by being worn on the skin and absorbing the sweat excreted over a period of time, tested positive for methamphetamine because he had had sexual relations with a woman who was under the influence of methamphetamine.

¹ Because respondent the State of Minnesota did not file a brief or move for an extension, this matter is proceeding under Minn. R. Civ. App. P. 142.03 (providing that, when respondent fails to file a brief, the case is to be determined on the merits).

The drug court judge told appellant that his explanation for the positive test was not believable or possible and that he could not continue in the drug court program if he was not honest.

In April 2021, appellant's sweat patch from March 30 to April 13 tested positive for methamphetamine. Appellant denied using drugs and said he did not know why his sweat patch tested positive. He was terminated from the drug court program and transferred to a different district court judge for a probation-revocation hearing.

At that hearing in June 2021, appellant's probation officer testified that appellant had failed to complete the aftercare program, to abstain from the use of mood-altering chemicals, and to successfully complete the recommendations of the chemical use assessment. The probation officer stated that he did not believe appellant "was amenable to probation at this time." Appellant testified, again, that his August 2020 positive sweat patch was the result of a relationship with a woman who tested positive for drugs. He also testified that he did not know why his April 2021 sweat patch came back positive, but said it might have been the result of his sitting next to meth users with whom he shared books.

The district court rejected appellant's explanations for the positive tests in August 2020 and April 2021 and found that (1) appellant failed to complete and was terminated from the drug court program, (2) his termination was the result of his failure to abide by the rules of the program, and (3) both his denial of use and his testimony about why the patch was compromised were unpersuasive and were not credible.

Appellant's probation was revoked, and he challenges that revocation.

DECISION

“The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion.” *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Before revoking probation, a district court must: “(1) designate the specific condition or 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.” *Id.* at 250 (the *Austin* factors). Appellant argues that the district court failed to meet the first and third factors.

1. Specific Probation Condition Violated

As the district court pointed out at the hearing, the standard of proof for a probation violation is not proof beyond a reasonable doubt but clear and convincing evidence. *See* Minn. R. Crim. P. 27.04, subd. 2(1)(c) (providing that a probationer must be told of his right to “a revocation hearing to determine whether clear and convincing evidence of a probation violation exists”).

Appellant was alleged to have violated three probation conditions: (1) complete the drug court program, a condition imposed on December 31, 2019; (2) abstain from the use of all mood-altering chemicals, a condition imposed in February 2014 and later reimposed; and (3) complete the recommendations of the chemical use assessment, also a condition

imposed in February 2014. He does not challenge the decision that he violated the second and third conditions.²

As to the first condition, the drug court judge who terminated appellant from the program said that he “failed to abide by the rules of the . . . [d]rug [c]ourt [p]rogram,” he “received every service, every support, and every training and education that is available from the [d]rug [c]ourt team”; “. . . these efforts [were] unable to assist [appellant] in [achieving] long-term sobriety,” and “the [d]rug [c]ourt [t]eam determined that there were no additional steps or measures available to them to assist him and, as such, termination was the only remaining alternative at this time.”

The district court, following the probation revocation hearing, found that appellant

did fail to complete, and was terminated from, [the drug court] program and did not successfully complete it. . . . [H]is termination from treatment court was a result of his failure to follow . . . the rules of [the d]rug [c]ourt program. Th[is c]ourt has no basis on which to make a determination at this time that that finding is in any way incorrect, and the court accepts that finding of the drug court judge.

Clear and convincing evidence supports the finding of both the drug court judge and the district court judge that appellant failed to complete the drug court program, thereby violating a condition of his probation.

² The district court also found orally at the hearing that appellant “was terminated from the continuing care portion of his chemical dependency treatment program at Project Turnabout, again, as a result of the continued use.” Appellant challenges the finding in his brief, arguing that it is not supported by clear and convincing evidence. But the finding is based on and supported by the testimony of appellant’s probation officer. In any event, appellant’s argument is not relevant: the probation condition appellant was alleged to have violated was completion of the drug court program, and both the transcripts and documents in the record provide ample evidence of that violation.

2. The Need for Confinement

Appellant also argues that the district court abused its discretion in finding that the need for appellant's confinement outweighed the policies favoring probation. Revoking probation and executing a prison sentence should occur only if the court finds that "(1) confinement is necessary to protect the public from the offender's further criminal activity, (2) the offender is in need of correctional treatment that can be most effectively provided if he is confined, or (3) not revoking probation and executing the sentence would unduly depreciate the seriousness of the offense." *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005).

The district court found that all three of these factors supported the revocation of appellant's probation and wrote as to the third factor:

[Appellant] has been afforded many opportunities, and the most extensive supervision and programming that is available, and yet [he] still fails to comply with the supervision requirements. Treatment Court is designed with the structure necessary for [him] to successfully complete probation, but he refused to comply with the rules and requirements of Treatment Court. This is the fifth time [he] has been brought back to court and found to be in violation of probation. The record is abundantly clear that [he] does not value the opportunity of probation, and is unwilling to comply with the terms of supervision.

. . . .

[His] behavior demonstrates that he . . . is not amenable to probation and cannot be relied upon to avoid criminal activity while on probation.

At the conclusion of the hearing, the district court said it

especially finds that this was supposed to be, based upon the sentencing guidelines, a commit to the commissioner of corrections from the outset. [Appellant] was given an outstanding opportunity to stay out of prison and has been back here so many times. This is not a decision made by the Court because of a technicality. This is not a decision made by this Court as a reflexive reaction to anything. It is a consideration of the whole of this case.

Appellant claims that this finding is contrary to the record, arguing that the district court “fail[ed] to consider appellant’s consistent and sincere advancement through the treatment programs and the continued availability of appropriate programming in the community” and “revoked [his] probation because he used drugs one-too-many times.” He also claims his relapses into drug use were “accumulated technical violations that cannot permit revocation under *Austin* and *Modtland*.”

But the revocation in *Austin* was affirmed because the defendant “failed to take advantage of the opportunity [for treatment] or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed . . . [and] the seriousness of his violation would be denigrated if probation were not revoked,” 295 N.W.2d at 251. The revocation in *Modtland* was reversed because “the district court did not address either the second or third *Austin* factor before revoking probation.” 695 N.W.2d at 608. Both cases are distinguishable, and neither case supports reversing the revocation of appellant’s probation.

Affirmed.