STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1438

State of Minnesota,
Respondent,

vs.

Luis Garcia Ortiz,
Appellant.

Filed May 31, 2022
Reversed and remanded
Smith, John, Judge[*]

Nobles County District Court
File No. 53-CR-16-77

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

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, William C. Lundy (certified student attorney), Slayton, Minnesota (for respondent)

Michelle K. Olsen, Jacob M. Birkholz, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Smith, John, Judge.

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

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We reverse and remand, with instructions for the district court to vacate its revocation of Ortiz's stay of adjudication, because the district court erred by (1) finding appellant violated a specific condition of his probation and (2) failing to clarify the specific conditions of Ortiz's probation.

FACTS

These facts are taken from the district court's findings from its sentencing order after a contested probation-revocation hearing and are supplemented by the record when relevant to the issues on appeal.

In September 2017, appellant Luis Garcia Ortiz entered a *Norgaard* plea to one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2020).[1] Under the plea deal, adjudication would be stayed, Ortiz would complete a psychosexual evaluation and share the results with the district court before sentencing, and argument about the psychosexual evaluator's recommendations would be made at sentencing.

Ortiz completed the psychosexual evaluation with licensed psychologist Dr. Tricia Aiken. Ortiz "denied any history of sexual abuse" during the evaluation and Dr. Aiken

[1] "A defendant may enter a *Norgaard* plea when he or she is unable to remember the specific facts of the offense because of intoxication or amnesia but is persuaded that he or she is likely to be convicted of the crime charged." *State v. Solberg*, 882 N.W.2d 618, 621 n.1 (Minn. 2016) (citing *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994); *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 872 (Minn. 1961).

reported it was "not possible to currently determine whether or not [Ortiz] meets criteria for any deviant sexual interests due to lack of information" because of Ortiz's denials. Dr. Aiken's recommendation stated, "I nevertheless recommend if [Ortiz] is convicted of this offense he participate in outpatient sex offender group treatment."

In February 2018, the district court "sentenced and placed [Ortiz] on probation" for ten years. The district court's sentencing order required Ortiz to complete the psychosexual evaluation "and comply with all recommendations made therein" as a condition of his probation.

In June 2021, Ortiz's probation officer, Shanell Schneider, filed a probation violation report (PVR), which led to a contested revocation hearing in September 2021, where Schneider, Ortiz's treatment provider—Tonya Grothe-Bumgardner, and Ortiz testified.

The PVR stated the psychosexual evaluation recommended "outpatient sex offender group treatment" and alleged that Ortiz violated his probation by "not successfully completing sex offender treatment," claiming this violated the condition requiring Ortiz to complete a psychosexual evaluation and comply with all recommendations.

The PVR alleged Ortiz "began individual sex offender programming through Southwestern Mental Health Center" in August 2018 with Grothe-Bumgardner, but throughout treatment Ortiz waffled between taking responsibility for the offense, denying the offense occurred, and justifying the offense because he was too intoxicated. Grothe-Bumgardner testified Ortiz successfully completed the treatment workbook, "but was unsuccessfully discharged because he plateaued in treatment."

Ortiz testified that he worked and cooperated with Grothe-Bumgardner for his three years in therapy, he attended all sessions except when Grothe-Bumgardner was on vacation, he did not fail to do anything asked, and he fully cooperated with treatment.

Based on its factual findings, the district court concluded Ortiz "failed to comply with probationary terms" by failing "to complete a Psychological Sexual Assessment and comply with all recommendations," Ortiz's "violation is intention[al] and without excuse," and "[t]he need for confinement outweighs the policies favoring probation and not revoking probation would unduly depreciate the seriousness of the violations." The district court revoked Ortiz's probation, vacated his stay of adjudication, adjudicated him guilty of first-degree criminal sexual conduct, and executed his 86-month prison sentence.

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). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). But whether the district court made the findings required for revocation of probation is a question of law we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

District courts must consider the following *Austin* factors before revoking probation and must make specific findings about each factor: (1) "designate the specific condition or condition that were violated"; (2) "find that the violation was intentional and inexcusable";

and (3) "find that the need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250.

The district court must "designate the specific condition" that was violated. *Id.* "Inherent" in this court's consideration of which specific probation condition was violated "is the question of whether the condition was actually imposed as a condition of probation." *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). "[I]f the condition was not properly imposed, it would be anomalous to conclude that the first *Austin* factor had been satisfied and go on to consider" the remaining *Austin* factors, as the district court cannot revoke probation for violation of a probation condition that was never actually imposed. *Id.* at 79-80.

When probation conditions prohibit non-criminal actions, "due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning." *Id.* at 80 (quoting *United States v. Dane*, 570 F.2d 840, 844 (9th Cir.1977)); Minn. R. Crim. P. 27.03, subd. 4(E)(2). "When prior fair warning 'is not contained in a formal condition, the record must be closely scrutinized to determine whether the defendant did, in fact, receive the requisite warning.'" *State v. Hoskins*, 943 N.W.2d 203, 210 (Minn. App. 2020) (quoting *Austin*, 295 N.W.2d at 251).

Ortiz moved to dismiss the probation violation claiming the recommendation to attend treatment was conditioned on a conviction, not a stay of adjudication. Even so, the district court did not address this argument as it made no findings about whether the psychosexual evaluation recommended treatment. The district court concluded Ortiz "failed to comply with probationary terms by [failing] to complete a Psychological Sexual

Assessment and comply with all recommendations." The district court's only findings on the existence of this condition were that (1) one of Ortiz's conditions of probation was to complete a psychosexual evaluation and "comply with all recommendations made therein"; and (2) Schneider's PVR stated the psychosexual evaluation recommended Ortiz "[e]nter and successfully complete an outpatient sex offender group treatment program and follow all recommendations."

The record reflects that Ortiz completed the psychosexual evaluation in December 2017 and the district court had the report at sentencing in February 2018. Contrary to the district court's finding about the PVR's characterization of the probation condition, Dr. Aiken's report stated, "I nevertheless recommend if [Ortiz] is convicted of this offense he participate in outpatient sex offender group treatment."

Ortiz contends the district court "failed to designate the specific condition" he violated because the condition of completing sex offender treatment was never made as the psychosexual evaluation's "explicit recommendation" is for him to **participate** in sex-offender treatment "**if he is convicted of this offense**." Specifically, Ortiz contends, first, that he was never convicted because adjudication was stayed, and, second, that the district court never ordered at sentencing that the psychosexual evaluation required completion of sex offender treatment.

We begin by considering Ortiz's second argument. Dr. Aiken recommended that, "if [Ortiz] is convicted of this offense[,] he **participate** in outpatient sex offender group treatment." Dr. Aiken stated that Ortiz's risk level is comparable to a typical sex offender even based on the limited knowledge she could glean from the assessment. Dr. Aiken

recommended Ortiz participate in objective testing to assess his sexual interests, assessments for anger management issues, and work on learning coping skills during treatment. Dr. Aiken stated her hope that Ortiz would be open about his emotions, stressors, and sexual interests so treatment could be beneficial. Lastly, Dr. Aiken stated she had "concerns about the safety of [Ortiz's] young step-daughter" and stated he should have no unsupervised contact with his step-daughter "until his sexual interests can be more accurately assessed in sex offender treatment" so his treatment providers could assess whether contact with young children was advisable.

When reviewed as a whole, Dr. Aiken's recommendation was for Ortiz to "participate" in sex offender treatment, not complete treatment. The record evidence contradicts the district court's finding that the psychosexual evaluation recommended Ortiz "[e]nter and successfully complete an outpatient sex offender group treatment program and follow all recommendations." We conclude that the district court, through the psychosexual evaluation, imposed a probation condition requiring Ortiz to participate in sex offender treatment. Furthermore, we conclude that Ortiz fulfilled this condition by participating in sex offender treatment for around three years, beginning in June 2018, attending polygraphs as required, and completing his sex offender treatment workbook.

Thus, the district court erred by determining the first *Austin* factor was satisfied because the condition it determined Ortiz violated—completion of sex offender treatment—was never actually imposed. *See Austin*, 295 N.W.2d at 250; *Ornelas*, 675 N.W.2d at 79 (holding a probation condition must be actually imposed to meet the first *Austin* factor). In light of that conclusion, we need not address Ortiz's first argument, that

the district court did not order him to follow Dr. Aiken's recommendations on the ground that he was not "convicted" of the offense to which he pleaded guilty because of the stay of adjudication. Because the first *Austin* factor was not satisfied, we need not review the remaining *Austin* factors. *See Ornelas*, 675 N.W.2d 79-80 ("[I]f the condition was not properly imposed, it would be anomalous to conclude that the first *Austin* factor had been satisfied and go on to consider" the remaining *Austin* factors as the district court cannot revoke probation for violating a probation condition unless the condition was actually imposed).

Accordingly, this matter is reversed and remanded with instructions to the district court to vacate its revocation of Ortiz's stay of adjudication.

Reversed and remanded.