

*This opinion is nonprecedential except as provided by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
A22-1078**

State of Minnesota,
Respondent,

vs.

Eric Demont Wilson,
Appellant.

**Filed March 27, 2023
Affirmed
Bjorkman, Judge**

Blue Earth County District Court
File No. 07-CR-15-2879

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the revocation of his probation following his third set of probation violations, arguing that the district court abused its discretion by determining his

violations were inexcusable and by failing to weigh the policies favoring probation against the need for confinement. Appellant also contends that his sentence is illegal because it is based on an incorrect criminal-history score. We affirm.

FACTS

In October 2018, appellant Eric Wilson pleaded guilty to fourth-degree criminal sexual conduct and felony theft stemming from offenses he committed in 2015. Prior to sentencing, a psychosexual evaluation and pre-sentence investigation (PSI) were completed. Probation prepared a sentencing worksheet that included one point each for Illinois convictions for “dangerous drugs” and “burglary.” Wilson did not object to the calculation of his criminal-history score. In January 2019, the district court imposed a stayed 48-month prison sentence for the criminal-sexual-conduct conviction, ordered Wilson to serve 246 days in jail, and placed him on probation for ten years.¹ Wilson’s probation conditions required him to successfully complete sex-offender treatment, submit to polygraph examinations as requested, remain law-abiding, and notify probation within 72 hours of any contact with law enforcement or new criminal charges.

In February 2020, respondent State of Minnesota filed a probation-violation report after Wilson was charged with gross-misdemeanor domestic assault. Two months later, the state amended the report to include that Wilson had failed to successfully complete sex-offender treatment because he (1) did not attend multiple group and individual therapy appointments, (2) did not submit to a required polygraph, and (3) did not admit

¹ The district court imposed a concurrent 120-day sentence for the theft conviction.

responsibility for his criminal sexual conduct. The district court found Wilson in violation but reinstated his probation and imposed intermediate sanctions.

In October 2020, the state filed a second probation-violation report based on Wilson's continued failure to complete sex-offender treatment and failure to report law-enforcement contact. Wilson admitted the violations and the district court again reinstated his probation with intermediate sanctions.

In March 2022, the state filed a third probation-violation report again alleging that Wilson did not successfully complete sex-offender treatment. The report detailed Wilson's absences from treatment sessions, lack of progress in treatment, and refusal to take responsibility for his underlying conduct. And the report alleged that Wilson failed to submit to two required polygraphs.

At the hearing, Wilson admitted that he violated probation by failing to successfully complete sex-offender treatment and not submitting to the polygraphs. He offered several explanations, including that he did not submit to the second polygraph because his wallet had just been stolen, leaving him unable to provide identification or payment for the examination; he completed one of the missing treatment assignments but was unable to submit it prior to his discharge from the program; and his treatment absences were due to a variety of health issues, including a dog bite that required emergency care. Wilson submitted a police report regarding the wallet theft, written communications with probation, and medical records.

After hearing testimony from Wilson and considering the arguments of counsel and probation, the district court took a recess to consider its decision. When the hearing

resumed, the district court revoked Wilson's probation and executed the stayed sentences.

The district court noted that Wilson admitted the violations, and reasoned:

It is possible that to some extent these are, these violations are, explainable. But under the circumstances here and your obligation to engage in probation, and given my ability to review some of these communications and see just how painstaking probation has had to work in order to draw progress, if any, from you, including information, I conclude that the violations were inexcusable.

The court further stated that it would unduly depreciate the seriousness of Wilson's violations if probation were not revoked because of "a combination of the immense[ly] passive, passive approach you've taken to probation, but also in conjunction with the fact that, again, we're here on a third violation." And it concluded, "given the totality of the record before the Court, Mr. Wilson, your efforts on probation have simply been too passive in order to be sufficient."

Wilson appeals.

DECISION

I. The district court did not abuse its discretion by revoking Wilson's probation.

A district court may revoke an offender's probation if it finds (1) the offender violated a specific condition or conditions of probation, (2) the violation was intentional or inexcusable, and (3) the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). In revoking probation, courts may not merely recite these three factors—they must "seek to convey their substantive reasons for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). "This process prevents courts from reflexively revoking probation when it is

established that a defendant has violated a condition of probation.” *Id.* We will only reverse a probation revocation if the district court clearly abused its discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

Wilson first argues that the district court’s determination that his violations were inexcusable is incorrect under the law and unsupported by the record. He specifically contends that the district court erred by considering whether each of Wilson’s several missed treatment appointments—rather than his actual discharge from treatment and failure to submit to a polygraph—were inexcusable. And he asserts that the record does not support a finding that his admitted violations were inexcusable. We are not persuaded.

Wilson’s discharge from the sex-offender treatment program violated a core condition of his probation. He attempted to excuse the violation by explaining his attendance and other issues during the probation-violation hearing. We see no error by the district court in considering Wilson’s proffered explanations. And Wilson provides no legal authority to convince us that the district court was not permitted to consider the reasons for his discharge from treatment when deciding whether that discharge—and the resulting probation violation—was inexcusable.

In addition to Wilson’s undisputed failure to attend treatment sessions, the record reveals his complete lack of progress in treatment and his continued denial of responsibility for his criminal sexual conduct. The district court considered all of the circumstances surrounding Wilson’s failure to successfully complete treatment for a third time, acknowledged Wilson’s explanations, and determined that his explanations did not excuse his repeated noncompliance with treatment and ultimate discharge from the program. On

this record, the district court did not abuse its discretion when it found Wilson's probation violation inexcusable.

Wilson next challenges the third *Austin* finding, arguing that the district court did not weigh the policies favoring probation and that the record cannot support a finding that the need to confine Wilson outweighs those policies. Under the third *Austin* factor, the need for confinement outweighs the policies favoring probation if:

- (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.

Modtland, 695 N.W.2d at 607 (quoting *Austin*, 295 N.W.2d at 251).

Contrary to Wilson's assertion, the district court did more than merely recite the third *Austin* factor. The district court weighed the need for confinement against the policies favoring probation, expressly stating that it would unduly depreciate the seriousness of Wilson's violations if probation were not revoked. The district court observed that this was Wilson's third violation and noted probation's "painstaking" efforts to support Wilson's progress. In summing up why the policies favoring probation were outweighed, the court stated that "the seriousness here is a combination of the immense[ly] passive, passive approach you've taken to probation, but also in conjunction with the fact that, again, we're here on a third violation."

The record supports the district court's determination. At the time of the revocation hearing, Wilson had been on probation for more than three years. During those three years,

he did not complete sex-offender treatment, did not submit to even one polygraph, and did not acknowledge his sexual misconduct. Despite admitted violations in February and October of 2020 for, among other things, failure to complete sex-offender treatment, the district court reinstated Wilson’s probation. The 2022 violations—which mirror the prior violations—go to the heart of Wilson’s probation conditions. His myriad failures to comply with and complete treatment persisted despite probation’s concerted efforts.

In sum, the district court’s determinations that Wilson’s admitted probation violations are inexcusable and that continuing him on probation would depreciate the seriousness of his violations are sound. We discern no abuse of discretion by the district court in revoking probation and executing Wilson’s 48-month sentence.

II. Wilson’s sentencing challenge is not properly before this court.

Wilson asserts that the district court erred in calculating his criminal-history score because it included two Illinois offenses as being equivalent to Minnesota felony offenses. He did not raise this issue at sentencing or during the probation-revocation proceeding. But a defendant cannot forfeit review of a sentence based on an incorrect criminal-history score. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

The sentencing guidelines require that convictions from other jurisdictions be considered when calculating a defendant’s criminal-history score. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); Minn. Sent’g Guidelines 2.B.5.a (2014). But an out-of-state felony conviction may only be included if it would be defined as a felony in Minnesota based on the elements of the offense and if “the offender received a sentence that in Minnesota would be a felony-level sentence.” Minn. Sent’g Guidelines 2.B.5.b (2014). At

sentencing, the state must prove that an out-of-state conviction qualifies for inclusion in a defendant's criminal-history score. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). After the time for a direct appeal passes, the defendant bears the burden to prove they were sentenced based on an incorrect criminal-history score. *Id.* at 743.

The record evidence is insufficient to determine if Wilson's Illinois convictions were properly included in calculating his criminal-history score. Because Wilson cannot develop the record further on appeal, we decline to address the merits of his argument. But we note that he may seek relief in district court through a motion to correct his sentence. *See* Minn. R. Crim. P. 27.03, subd. 9.

Affirmed.