**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1211**

State of Minnesota,
Respondent,

vs.

C.S.W.-S.,
Appellant.

**Filed March 11, 2013**
**Affirmed**
**Stoneburner, Judge**

Beltrami County District Court
File No. 04-JV-09-1391

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Timothy R. Faver, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Kirk, Judge.

**U N P U B L I S H E D  O P I N I O N**

**STONEBURNER**, Judge

Appellant challenges the order revoking his extended jurisdiction juvenile (EJJ) probation and executing the previously imposed 144-month presumptive sentence for his conviction of first-degree criminal sexual conduct. Appellant asserts that the district

court improperly considered uncharged sexual conduct, admitted by appellant during sex-offender treatment, and evidence that appellant likely would have reoffended during EJJ probation but for the vigilance of his foster parents. Because the district court did not abuse its discretion by revoking appellant's EJJ probation or by executing the previously imposed presumptive adult sentence, we affirm.

**FACTS**

In 2009, less than a month before his 18th birthday, appellant C.S.W.-S. (W.-S.) was alleged delinquent for committing first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), for engaging in sexual contact with or penetration of a nine-year-old girl. Under a plea agreement, the state agreed to withdraw a petition to certify W.-S. as an adult and W.-S. agreed to plead guilty to the charge in an EJJ prosecution. In May 2009, the district court accepted the plea and imposed the guidelines presumptive adult sentence of 144 months in prison, stayed on the condition that W.-S. not violate the conditions of EJJ probation and not commit a new offense.

In relevant part, the EJJ probation required W.-S. to (1) successfully complete the in-patient sex-offender treatment (SOT) program at Mille Lacs Academy; (2) follow all rules and requirements of probation; (3) have no unsupervised contact with any males or females younger than he; (4) not use or possess any sexually explicit material; and (5) have no unsupervised use of the Internet.

At SOT, W.-S. initially failed but subsequently passed a polygraph examination about his prior sexual history. In the successful examination, W.-S. revealed that, between the ages of 14 and 17, he had offended against seven juveniles who ranged in

age from four to sixteen. No additional charges were brought as a result of these disclosures.

The Mille Lacs Academy SOT is typically a 9- to 12-month program. After 15 months, W.-S. was not even halfway through the program. In October 2010, his probation agent filed a violation report for not making adequate progress in the program. W.-S. admitted the violation, and the district court reinstated probation after warning W.-S. that continued failure to progress in treatment could result in placement at the Red Wing SOT or execution of his stayed adult sentence.

W.-S. completed the primary objectives of SOT and was successfully discharged in April 2011, after he aged out of eligibility to remain at Mille Lacs Academy. The SOT discharge report stated that W.-S. remained a moderate risk to reoffend and it was "imperative that his living environments and caregivers support a structured lifestyle wherein he is held highly accountable for his activities."

W.-S. was placed in a foster home experienced in working with sex offenders. He worked and attended sex-offender aftercare and individual counseling. A June 30, 2011 progress report from his probation agent noted that W.-S.'s "biggest issues have revolved around lying, lack of motivation and stealing," and that W.-S. requires a great deal of supervision. Soon after this report was filed, W.-S. went on a camping trip with his foster parents where he made many attempts to avoid supervision in order to be with a 14-year-old girl who was also staying at the campground. When confronted about this behavior, W.-S. admitted that if he had been alone with the girl he likely would have reoffended.

In December 2011, W.-S.'s probation agent submitted a violation report as a result of W.-S. having been found with, and admitting to purchasing, three pornographic magazines, which he kept in the same folder as his sex-offender relapse-prevention plans. W.-S. admitted the violation, and the district court once again reinstated probation with an additional requirement that W.-S. serve 18 days in jail. The district court again warned W.-S. that a subsequent violation could result in imposition of the adult sentence.

Shortly before W.-S.'s 21st birthday, which would have ended the juvenile court's jurisdiction, the probation agent approved W.-S.'s purchase of a cell phone to aid in his employment search. Within a week of W.-S. receiving the cell phone, his foster parents found pornographic content on the phone. W.-S. had created a "porn" folder on the phone for a website that included pornographic pictures and sexually oriented games. Five days before his 21st birthday, W.-S. was arrested on a warrant for this apparent violation. After his arrest, W.-S.'s foster parents found a pornographic DVD hidden in his room.

In April 2012, W.-S., who turned 21 on March 28, 2012, admitted violating EJJ probation by possessing pornographic material and using his cell phone to access a pornographic website. The district court revoked W.-S.'s EJJ probation.

At a subsequent disposition hearing, W.-S.'s probation agent recommended that the district court revoke W.-S.'s EJJ probation but grant a downward dispositional departure and place W.-S. on adult probation. The therapist who had treated W.-S. weekly since May 2011 testified that W.-S. seemed to improve over the course of therapy, but lying, boundaries, and impulse controls were concerns, as were W.-S.'s

continued use of pornography and admitted plan to use alcohol when he turned 21. The therapist expressed concern about W.-S. living in a non-structured setting and was not sure whether W.-S. might reoffend.

The district court made specific findings on the *Austin* factors, including findings that: (1) W.-S. remains a significant risk to reoffend sexually; (2) W.-S.'s violations after leaving Mille Lacs Academy "demonstrate that he cannot be counted on to avoid antisocial behavior"; (3) there are no mitigating factors justifying discharging W.-S. from EJJ probation or departing dispositionally from the presumptive adult sentence; (4) W.-S. needs additional sex-offender treatment "that can only be provided in a highly structured environment"; (5) discharging W.-S. from EJJ probation or departing dispositionally from the adult sentence "would unduly depreciate the inexcusable violation of probation"; and (6) "[e]xecution of [W.-S.'s] adult sentence is necessary to protect the public from the risk of his re-offending." *See State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The district court then vacated the stay of execution of W.-S.'s adult sentence, executing the previously imposed 144-month prison sentence. This appeal followed.

## D E C I S I O N

We construe W.-S.'s brief as raising two issues: (1) whether, in revoking EJJ probation, the district court improperly considered W.-S.'s uncharged sexual history revealed in SOT and W.-S.'s admission that, but for the vigilance of his foster parents, he likely would have reoffended during a camping trip and (2) whether the district court abused its discretion by failing to grant a stay of the previously imposed adult sentence.

## I. EJJ probation revocation

"The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation." *Austin*, 295 N.W.2d at 249-50. Absent a clear abuse of discretion, we will affirm a probation-revocation order and a disposition in a juvenile-delinquency case. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005). When revoking the juvenile's probation, the district court must make sufficient written findings in support of its disposition order. *Id.* at 302-04.

Before revoking EJJ probation, a district court must (1) identify the "condition or conditions 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." *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003) (quoting *Austin*, 295 N.W.2d at 250). W.-S. does not dispute that his probation conditions prohibited using or possessing any sexually explicit material and using the Internet without supervision. W.-S. admitted that he possessed sexually explicit material and used his cell phone to access the Internet to view a pornographic website. As W.-S. concedes in his appellate brief, "the only issue for the [district] court to decide was the appropriate sanction for the violation."

W.-S. challenges the district court's finding on the third *Austin* factor—that the need for confinement outweighs the policies favoring probation—arguing first that the district court abused its discretion when it considered his SOT sexual-history disclosure in revoking his EJJ probation. W.-S. asserts that (1) under *Austin*, the district court is prohibited from considering conduct that occurred prior to the offense before the court to

support a revocation decision; (2) the polygraph examination during which W.-S. made this disclosure was mandated by his probation; and (3) polygraph results are not admissible in court because they have not been proven as scientifically reliable. But these arguments relate primarily to the first two *Austin* factors, which W.-S. concedes were satisfied by his admissions.

Because the revocation hearing occurred after W.-S. reached the age of 21, the district court did not have the option to maintain W.-S. on EJJ probation. And W.-S. does not argue that the record in this case supports his successful discharge from EJJ probation. The entire focus of the third *Austin* factor, therefore, was on the appropriate adult sanction for W.-S.'s admitted probation violations. Even if W.-S.'s brief could be read to imply a challenge to revocation of EJJ probation and imposition of an adult sanction, we find no merit to such a challenge on this record. We turn then to the issue of whether the district court abused its discretion by denying W.-S.'s request for a downward dispositional departure from the previously imposed sentence.

## II. Execution of previously imposed prison sentence

We review a sentencing court's decision regarding departure from the sentencing guidelines for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). "[A] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999); *but see State v. Bendzula*, 675 N.W.2d 920, 923 (Minn. App. 2004) (noting that the guidelines preserve and enlarge the district court's discretion to depart downward). The district court must order a guidelines sentence unless the case involves "substantial

and compelling circumstances" to warrant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If the case involves substantial and compelling circumstances, it is within the district court's discretion whether to depart. *State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard in evaluating departure), *review denied* (Minn. Jan. 14, 1991). On review, we "may not interfere with the sentencing court's exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985). Only in a "rare" case will we reverse a district court's imposition of a guidelines sentence. *Kindem*, 313 N.W.2d at 7.

Because W.-S. committed an offense that presumes commitment to prison, the district court must, after finding that reasons existed to revoke the stay of the adult sentence, "order execution of the previously imposed sentence unless the court makes written findings regarding the mitigating factors that justify continuing the stay." Minn. Stat. § 260B.130, subd. 5 (2008); Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(3). Mitigating factors include amenability to treatment, successful completion of a treatment program, and whether the violations show a potential for recidivism. *B.Y.*, 659 N.W.2d at 770. Here, the district court concluded that there were no mitigating factors that would justify a stay in the execution of W.-S.'s adult sentence.

The district court stated that it relied on W.-S.'s disclosures made during treatment for three limited purposes:

> 1) for understanding a part of the reason why [W.-S.'s] treatment team considered him to [be] a moderate risk to re-offend; 2) for use in deciding whether the State proved the third *Austin* factor by clear and convincing evidence; and 3) for use in satisfying the requirement of Minn. Stat. § 609.1351 that [the district court] express a preliminary opinion as to whether a [civil commitment petition] may be appropriate.

W.-S.'s risk of reoffending is plainly relevant to the third *Austin* factor; therefore, we conclude that the district court did not abuse its discretion by using W.-S.'s SOT sexual-history disclosures for the stated purposes.

W.-S. next argues that the district court abused its discretion by considering as a probation violation his admission that he likely would have reoffended with a 14-year-old girl during a camping trip, but for the vigilance of his foster parents. We agree that, based on the record before us, the district court erroneously referred to this incident as a probation violation. But one of the conditions of W.-S.'s probation was that he "not have any unsupervised contact with males or females younger than he," and his admission that he attempted to violate this condition and likely would have reoffended if he had succeeded is relevant to the district court's determination whether mitigating circumstances exist to support a downward departure. The admission is evidence of W.-S.'s continuing need for a highly structured environment and the risk he poses to public safety.

W.-S. additionally argues that the district court abused its discretion by failing to find that evidence of his amenability to probation did not constitute a mitigating circumstance justifying a dispositional departure. We disagree.

After stating that he would recommend ongoing probation, W.-S.'s therapist noted that "there needs to be more structure than what we had initially thought back in March before this last incident. Possibly a group home kind of setting, where he is monitored closer. I also think that ongoing therapy would be very important." And the testimony of W.-S.'s probation agent that he is amenable to probation was similarly equivocal. W.-S.'s probation agent expressed concerns about W.-S.'s ability to comply with adult probation because of the length of time, his periods of struggling on EJJ probation, his impulsivity, and his recent "blatant violations." And when asked whether she believed that W.-S. would "make it through" adult probation, she testified that, while she thought he could, it was "hard to say" that he would. Although she also testified that, on adult probation, W.-S. would initially have weekly contact with his probation agent, she agreed that W.-S.'s violations occurred while he was on probation and living in a structured environment.

The district court made extensive findings of fact supporting its conclusion that there were no mitigating factors supporting a downward dispositional departure, and these findings are not clearly erroneous. *See Van Ruler*, 378 N.W.2d at 80-81; *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996) ("The [district] court's factual findings are subject to a clearly erroneous standard of review."), *review denied* (Minn. Nov. 20, 1996). The district court did not abuse its discretion by denying a downward dispositional departure and executing the previously imposed sentence.

**Affirmed.**