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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1728**

State of Minnesota,
Respondent,

vs.

John Alvin Eidum,
Appellant.

**Filed May 20, 2013
Affirmed
Stoneburner, Judge**

Dakota County District Court
File No. 19HACR09842

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

James C. Backstrom, Dakota County Attorney, Karen Wangler, Assistant County
Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's order revoking his probation, arguing that the evidence does not establish that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

In 2009, appellant John Alvin Eidum pleaded guilty to one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(b) (2008), stemming from multiple incidents involving his stepdaughter, beginning when she was 13 years old. The district court accepted the plea but, pursuant to Minn. Stat. § 609.342, subd. 3 (2008), stayed imposition of sentence and placed Eidum on probation for 20 years with conditions.¹

Probation conditions included the requirements that Eidum complete sex-offender treatment, have no unauthorized contact with minors, and not use or possess pornographic materials. At sentencing, the district court warned Eidum that any probation violation involving sexually inappropriate behavior would result in execution of the presumptive 144-month sentence. *See* Minn. Stat. § 309.342, subd. 2(a) (2008).

Eidum participated in sex-offender treatment at Project Pathfinder. His final goal for treatment was to successfully prove, through polygraph examination, that he had not

¹ Minn. Stat. § 609.342, subd. 3, provides that the district court may, contingent on specific findings and with specific conditions, impose a stay of imposition when a defendant has an authoritative position over the complainant and the complainant was between 13 and 16 years of age at the time of the sexual penetration.

had contact with his children, and that he had not used or possessed pornographic materials. Eidum succeeded in demonstrating no contact with his children, but, beginning in January 2011, failed several examinations regarding pornography.

In May 2012, as a result of disclosures made during his last polygraph examination, the treatment program and Eidum's probation agent learned that, for months, Eidum was aware of the location of a cell phone that he had used to photograph his victim and that continued to contain pornographic images of his victim. Eidum delayed revealing to the treatment program or his probation agent that he knew that the cell phone was located at his family's apartment. Eidum stated that he eventually took possession of the cell phone and destroyed it. The revelations about the cell phone resulted in his discharge from Project Pathfinder and his probation agent's filing of a violation report in May 2012, alleging two violations of the conditions of probation:

1. *Participate in and complete sex offender treatment as directed by the probation officer and be responsible for all treatment costs per Dakota County Corrections sex offender subsidy policy.* On 5/11/12, Eidum was discharged unsuccessfully from sex offender treatment at Project Pathfinder (PPI.)
2. *No use or possession of pornographic materials.* On 5/7/12, Eidum disclosed that he had in his possession a cell phone that contained videos and images of his minor victim's genitals and also may have an image of him penetrating the victim's vagina with his finger. He relayed that he had destroyed this phone into pieces "about a month ago" and "hammered it out" some more earlier in the day of this disclosure. He indicated he knew he had this phone in his possession, but had last viewed the images on it prior to being charged.

(italics in original). The report characterizes the alleged violations as “intentional and inexcusable” and states that the need for incarceration outweighs policies favoring probation. The report also stated that Eidum had two additional probation violations for which the agent had not filed violation reports: “1. 08/20/10: Eidum incurred a Work Release violation while serving his annual 30 days in Jail for failing to report directly back to the jail as directed. 2. 02/11/12: Eidum self-reported for a 72 hour A&D for unauthorized use of computers and unauthorized contact with a minor male.”

At the probation-violation hearing, Eidum admitted the allegations in the violation report but denied having accessed the images on the cell phone. He requested continuation of the stay of imposition, or a stay of execution, arguing that he has not reoffended and wanted to find another program that would accept him and allow him to complete treatment.

The state argued for execution of the 144-month sentence, asserting that “he’s before you on his third probation violation, he’s an untreated sex offender, Project Pathfinder won’t take him back, and he’s been deceptive about the fact that he’s maintained images of his child victim, in this case pornographic images.” Eidum’s probation agent expressed concern that (1) the images on the cell phone were not generic child pornography but were images of his victim that Eidum kept; (2) Eidum has admitted to police that a memory stick containing the images possibly still exists; (3) Eidum’s failure to tell the agent about the cell phone and memory stick indicates that he has no concern or empathy for the victim “that there are images of her in unflattering

light that potentially could be floating around in the community”; and (4) the violation was particularly “severe in nature since he’s revictimizing the victim.”

The district court acknowledged that this was the first time that Eidum was brought before the court for alleged probation violations, but noted that the incidents that had initially been handled by probation were, nonetheless, violations. The district court noted that Eidum’s discharge from treatment was based on lack of progress in the program in addition to violation of treatment rules by possessing a device with pornographic images. The district court made a record of Eidum’s demonstrated unwillingness or inability to progress and show change in treatment, his multiple deceptive polygraphs, lack of behavioral change, and violations of treatment and probation conditions. The district court found that Eidum’s probation violations were intentional and inexcusable and that the need for confinement outweighs the policies favoring probation. The district court, stating that Eidum unduly depreciates the seriousness of the conviction and his violations, vacated the stay and executed the statutory-presumptive 144-month sentence. This appeal followed.

D E C I S I O N

I. Standard of review

“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). When revoking probation, the district court must: “1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that

need for confinement outweighs the policies favoring probation.” *Id.* at 250. Once the district court determines that a violation has occurred, it may (1) continue the stay of imposition of the sentence and continue probation; (2) continue the stay of imposition of the sentence and impose an intermediate sanction; or (3) impose and execute a sentence. Minn. Stat. § 609.14, subd. 3 (2010).

II. *Austin* factors

A. Specific conditions violated intentionally or inexcusably

It is undisputed that the conditions of Eidum’s probation included participating in and completing sex-offender treatment and not using or possessing any pornographic materials. Eidum admitted violating both of these conditions of his probation. The district court found, on the record, that Eidum violated these conditions of his probation and that such violations were intentional and inexcusable. Eidum does not challenge the district court’s findings on these factors.

B. The need for confinement outweighs the policies favoring probation

“When determining if revocation is appropriate, [district] courts must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will.” *State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (quoting *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005)). Eidum challenges the district court’s conclusion that the need for confinement outweighs the policies favoring probation, arguing that the district court (1) erroneously found that this was his third violation and (2) abused its

discretion by failing to consider intermediate sanctions before executing the guidelines sentence.

1. Number of violations

Eidum argues that his failure to return directly to jail, and unauthorized use of computers and contact with a minor child, alleged in the violation report, should not have been considered as violations of conditions of probation because neither incident resulted in a violation report being filed with the district court or any adjudication of violation by the district court. *See* Minn. Stat. § 609.14, subds. 2, 3 (2010) (setting out the procedures for revocation of probation). Eidum cites no authority for the proposition that consideration by the district court of admitted failure to comply with conditions of probation constitutes error, nor does he cite any authority that requires that each violation must be separately presented to the district court for it to be counted as a violation. Even if Eidum could show that the district court erred or abused its discretion by considering the earlier violations, we conclude that any such error is harmless in this case because the district court's remarks on the record plainly demonstrate that Eidum's probation was revoked not for the earlier alleged violations that were handled by corrections, but for his failure to progress in and complete treatment and the circumstances of his continued access to pornographic images of his victim. *See State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994) (error is prejudicial only if there is a reasonable possibility that the outcome would have been more favorable to the defendant without it). Eidum's argument that the district court should not have found that the earlier incidents were probation violations is not relevant to whether his failure to progress in and complete treatment and his

possession of pornographic images of his victim support the district court's finding that the need for incarceration outweighed policies favoring probation.

2. Consideration of intermediate sanctions

Eidum also argues that the district court abused its discretion by not considering intermediate sanctions before imposing and executing the 144-month guidelines sentence for first-degree criminal sexual conduct. Eidum argues that his participation in Project Pathfinders demonstrates that he is amenable to treatment, that he tried hard to complete treatment, that he admitted his violations, and that he is remorseful. He asserts that these factors demonstrate that a jail sanction would have achieved the punishment and would have sufficiently "addressed the seriousness of the violation." Eidum asserts that "there were meaningful less restrictive sanctions available and . . . the evidence did not show that the need for confinement in prison outweighed the policies in favor of continuing [Eidum] on probation."

But Eidum cites no authority requiring the district court to make a record of consideration of intermediate sanctions before revoking probation and executing a sentence. And the record supports the reasons stated by the district court for finding that the need for confinement outweighs policies favoring probation. The district court did not abuse its discretion by imposing and executing the 144-month presumptive sentence.

Affirmed.